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No.

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In The
Supreme Court of the United States

October Term, 1988

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DeGROOT, KENNETH E. HAUBOLD, RICHARD HAUBOLD, PAUL A. HENDRICKS, and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, and MARY E. BUSHNELL, CHAIRMAN of the ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an unregulated, nonprofit electric distribution cooperative is to be treated as a "hybrid" between a municipality and a private entity and therefore as exempt, under this Court's decision in *Town of Hallie v. City of Eau Claire*, from the active-supervision requirement for state-action immunity from the federal antitrust laws.

2. Whether a state can immunize from the reach of the federal antitrust laws a horizontal allocation of territories between two private suppliers of electric power merely by authorizing such a market-division agreement, with no regulation of the rates charged by one of the resulting monopolies.

STATEMENT PURSUANT TO RULE 21.1(b)

The caption of the case in this Court lists all parties to the proceeding in the court of appeals.

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In The
Supreme Court of the United States
October Term, 1988

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DeGROOT, KENNETH E. HAUBOLD, RICHARD HAUBOLD, PAUL A. HENDRICKS, and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, and MARY E. BUSHNELL, CHAIRMAN of the ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Eldon Fuchs, *et al.*, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 20, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 858 F.2d 1210 and is reproduced in the Appendix, p. A-1. The Opinion Order of the district court is reported at 672 F.Supp. 1111 and is reproduced in the Appendix, p. B-1. Supplemental orders of the district court are unreported and are reproduced in the Appendix, pp. C-1, D-1, E-1.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1988. A petition for rehearing and rehearing *in banc* was denied on November 17, 1988 (Appendix, p. F-1). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Illinois Public Utilities Act, Ill.Rev.Stat., Ch. 111 2/3 § 1-101 *et seq.* (1987):

> § 3-104. . . . "Public utility" does not include . . . electric cooperatives as defined in Section 3-119 . . .
>
> § 3-119. "Electric cooperative" is any cooperative which is subject to the Electric Suppliers Act. . .
>
> § 4-101. The [Illinois Commerce] commission shall have general supervision over all public utilities . . .

Illinois Electric Suppliers Act, Ill.Rev.Stat., ch. 111 2/3, § 401 *et seq.* (1987):

> § 403.5. "Electric Supplier" or "Supplier" means an electric cooperative or a public utility which furnishes electric service.
>
> § 406. Any 2 or more electric suppliers may contract together defining and delineating, as between themselves, one or more service areas in which each such contracting supplier shall be entitled to furnish service. Such contracts are subject to the approval of the [Illinois Commerce] Commission.

Sherman Act § 1, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

STATEMENT OF THE CASE

Petitioners are individual electric customers of a rural electric cooperative, respondent Rural Electric Convenience Cooperative, Inc. ("RECC"). RECC is a party to a contract with a contiguous investor-owned utility, respondent Central Illinois Public Service Company ("CIPS"), under which the parties agreed on mutually exclusive territories for their electric service areas. Petitioners brought this action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, charging that the allocation of markets constituted a violation of Sections 1 and 2 of the Sherman Act by the respondent companies, and seeking damages and injunctive relief. (The complaint also sought declaratory and injunctive relief against the Illinois Commerce Commission and named its chairman, respondent Mary E. Bushnell, as a defendant.)

The complaint alleged that petitioners were members of the cooperative as a necessary prerequisite to obtaining electrical service; that CIPS could readily provide electrical service to the petitioners but refuses to do so because of the territorial agreement with RECC; that RECC's rates are substantially higher than those of CIPS; and that but for the market-allocation agreement between the two suppliers of electric power the rates charged by RECC would have been lower as the result of actual or potential competition from CIPS.

An Illinois statute, the Electric Supplier Act, authorizes suppliers of electric power to contract, subject to approval by the Illinois Commerce Commission, as to the respective areas in which each supplier is to provide service. Ill.Rev.Stat. Ch. 111-2/3, §406. Such agreements, once approved, control the rights of the respective companies as to what customers they may respectively serve. *Rural Elec. Convenience Coop. v. Ill. Com. Comm'n*, 75 Ill. 2d 142, 387 N.E.2d 670, 672 (1979). The rates of investor-owned utilities are regulated under the Illinois Public Utilities Act. Ill.Rev.Stat. Ch. 111-2/3 §§4-101, 9-101 *et seq.* Electric cooperatives are excluded from the Public Utilities Act. Ill.Rev.Stat. Ch. 111-2/3 §3-104. Their rates are not regulated. (The Illinois Commerce Commission has power to entertain complaints from customers that service

is inadequate and, if it so finds, to order release of the customer to another supplier. The Commission also has power to forbid discrimination among customers. Ill.Rev.Stat. Ch. 111-2/3 §409.) The territorial agreement between the defendant electric suppliers that assigns petitioners exclusively to RECC was entered into February 19, 1969 and received approval from the Illinois Commerce Commission on April 29, 1969.

The district court granted the respondents' motions to dismiss the complaint and for summary judgment, on the basis of the state-action antitrust exemption derived from *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943). The court conceded that in the absence of such immunity the agreement between RECC and CIPS would be a *per se* violation of the antitrust laws. 672 F.Supp. 1111, 1112 (C.D. Ill. 1987). The court also tacitly acknowledged that the Illinois Electric Supplier Act scheme cannot satisfy the "active supervision" prong of the state-action doctrine, as enunciated in *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980). The court concluded, however, that electric cooperatives, as not-for-profit corporations, are within the rationale of the "municipality" exemption recognized in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713 (1985), and therefore are not subject to the "active supervision" requirement.

The Court of Appeals affirmed. 858 F.2d 1210. While not expressly adopting the district court's conclusion that an electric cooperative is "analogous to a municipality," the court of appeals reasoned that the principle of the *Town of Hallie* decision should be extended to "hybrid" entities, that is, entities that do not have "the attributes of a purely private actor." The court implicitly accepted petitioners' contention that there can be no adequate supervision of the market division "policy" without price supervision focusing on RECC's rates, and recognized that "a pointed reexamination of market conditions is necessary to constitute active supervision of private parties." 858 F.2d at 1217. It held, however, that RECC's claim of immunity was not to be tested by that standard.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With This Court's Decisions And Seriously Undermines The Settled Requirements For State-Conferred Immunity From The Antitrust Laws By Applying The *Town Of Hallie* Decision To A New "Hybrid" Category Of Nongovernmental Actors.

This Court's decisions have established and enforced a "rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws." *Patrick v. Burget*, ___U.S.___, 108 S.Ct. 1658, 1662 (1988). First, the challenged restraint must be in accordance with a clearly articulated and affirmatively expressed state policy. Second, the anticompetitive conduct must be "actively supervised" by the State. *Patrick v. Burget, supra; California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721 (1985). The second branch of the requirement is not satisfied by the mere presence of some state involvement or monitoring; state officials must "have and exercise power to review particular anticompetitive acts of private parties." *Patrick v. Burget, supra*, 108 S.Ct. at 1663.

The decision below virtually nullifies the active-supervision requirement with respect to a large and indeterminate class of private actors, *viz.*, those that have "nonprivate" attributes – including, apparently, all cooperative organizations and all nonprofit organizations. Although the court purported to be applying a "less stringent" standard of supervision rather than none at all, the holding makes the active supervision requirement meaningless. The opinion recognizes that there is no state

supervision or regulation of the reasonableness of rates set by rural electric cooperatives in Illinois, the only kind of supervision or regulation that could offset the complete monopoly power insured by the exclusive-territory agreements that electric suppliers are authorized to enter into with one another. *Cf. Southern Motor Carriers Rate Conference, Inc. v. United States, supra,* 471 U.S. at 51, 105 S.Ct. at 1723 (noting that state public service commissions "have and exercise ultimate authority and control over all intrastate rates").

The court of appeals sought to justify its conclusion by reference to this Court's decision in *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713 (1985). That decision, however, cannot support the result reached below without a drastic transformation of the state-action immunity doctrine. The distinction drawn in *Town of Hallie* was a distinction between municipalities – i.e. governmental bodies – and private or nongovernmental actors. As the opinion below recognized, the rural electric cooperative involved in this case has none of the characteristics of governmental entities: it is "neither a municipality nor a state agency"; it is not subject to "public scrutiny" or to "the political process". 858 F.2d at 1217.

Although the opinion below professed to find difficulty in drawing the line between public agencies and private entities, the lower court decisions it cited provide no support for extending the *Town of Hallie* decision to nongovernmental bodies. The cases applying *Town of Hallie* have properly treated it as including other kinds of municipal corporations than municipalities, but have not extended it to nongovernmental actors as the opinion below does. Thus the municipal corporation at issue in *Interface Group v. Massachusetts Port Authority,* 816 F.2d 9 (1st Cir. 1987), the Massachusetts Port Authority, was defined by statute to be a "body politic and corporate . . . a public instrumentality." Its seven members

were appointed by the Governor of Massachusetts. Similarly, *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1290 (11th Cir. 1986) involved an airport authority created by the Florida legislature. The members of the authority were appointed by the Governor; it was subject to sunshine laws, had police power jurisdiction, eminent domain power, zoning authority, bonding authority, and rule making power. The ambulance service in *Ambulance Service of Reno, Inc. v. Nevada Ambulance Service, Inc.* 819 F.2d 910 (9th Cir. 1987), was a not-for-profit corporation incorporated by and created pursuant to an intergovernmental cooperation agreement among a county and several municipalities and was owned and controlled entirely by those counties and municipalities. And *cf.*, *LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985), *cert. den.*, 476 U.S. 1170 (1986) (intergovernmental agreement held immune).

Instead of observing the distinction between governmental bodies and private actors, the opinion of the court below purports to graft onto this Court's decisions a new "hybrid" category of actors, actors that are not governmental or municipal in nature but somehow are not "purely" private. Such a category corresponds to no established legal category, appears to be extremely elastic, and if accepted by other courts can only generate confusion and uncertainty concerning the reach of the doctrine of *Parker v. Brown* as developed in this Court's decisions. Moreover, the concept could hardly be accepted without abandoning the "supervision" requirement for major classes of entities heretofore deemed subject to the "rigorous two-pronged requirement" for receiving immunity. Thus, for example, if any category of enterprise could readily be deemed "not purely private" it would seem to be traditional "public utilities," such as common carriers. Yet this Court has specifically recognized the applicability of the "two-prong"

requirement to such enterprises. *Southern Motor Carriers Rate Conference, Inc. v. United States, supra.*

The court of appeals' reliance on the non-profit nature of the electric cooperative to place it in a distinct category under the antitrust laws contradicts both principle and authority. The antitrust laws are not concerned with profit but with efficiency. Consumers are as much injured by a nonprofit monopoly whose inefficiencies are sheltered by agreements in restraint of trade as they are by a similar monopoly that curtails output to realize greater profits. Nor has it been held heretofore that what would otherwise be violations of the Sherman Act are excused because the actors are nonprofit entities; the list of major antitrust decisions involving nonprofit entities is a long one. *E.g., National Collegiate Athletic Association (NCAA) v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948 (1984), to cite but one conspicuous recent example.

Nor is there any basis in authority for regarding cooperatives as different from other private entities fully within the reach of the antitrust laws. Where Congress has desired to give cooperatives special status under the antitrust laws it has done so by specific legislation, as in the case of agricultural cooperatives. There is no such exemption for electric cooperatives. Even where cooperatives have been given special status, that status has been held not to confer immunity on restraints of trade involving concerted action between the cooperative and other producers or entities. *E.g., Maryland and Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458, 80 S.Ct. 847 (1960); *Gulf Coast Shrimpers' and Oystermans' Association v. United States*, 236 F.2d 658 (5th Cir. 1956), *cert. den.*, 352 U.S. 927 (1956).

Indeed, as to rural electric cooperatives such as RECC, this Court has specifically indicated that "territorial allocation schemes" between investor-owned utilities and cooperatives constitute *per se* violations of the Sherman Act.

See Otter Tail Power Co. v. United States, 410 U.S. 366, 378-79, 93 S.Ct. 1022, 1030 (1973); *see also Montana-Dakota Utilities Co. v. Williams Electric Cooperative, Inc.*, 263 F.2d 431 (8th Cir. 1959) (territorial agreement between investor-owned utility and electric cooperative held void as illegal restraint of trade).

In the face of such authorities it is especially perplexing that the court of appeals should point to the "membership" aspect of the cooperative as supporting antitrust immunity, a suggestion that entirely overlooks the fact that petitioners and consumers like them are members not by choice but solely because the territorial agreement compels them to be members if they wish to obtain electric service at all.[1]

The decision of the court below is a sharp departure from settled principles concerning state-action immunity from the antitrust laws. It creates new grounds for immunity that have a wide and uncertain field for operation and that would materially undermine the enforcement of the antitrust laws against private activity. The decision in effect allows a state to nullify the antitrust laws merely by declaring a policy of permitting private market-allocation agreements – agreements that are indistinguishable in their economic effects from price-fixing schemes. It runs directly counter to the principle announced in this

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[1] Moreover, it is well known that the "control" such members can exercise is largely fictional. "Given managers' informational advantages, direct control by cooperative members, voting as shareholders at annual meetings, can be expected to be weak in all but the simplest ventures." R. Schmalensee, *The Control of Natural Monopolies* 92 (1979). And *see Arkansas Elec. Co-op v. Arkansas Pub. Serv. Com'n*, 461 U.S. 375, 394, 103 S. Ct. 1905, 1918 (1983): "... [T]here is evidence that even cooperative power utilities may engage in economically inefficient behavior, *see* generally R. Schmalensee, *The Control of Natural Monopolies* 91-93 (1979), and sources cited ..."

Court's decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, supra*, 445 U.S. at 106, 100 S.Ct. at 943:

> The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . "

Certiorari should be granted to clarify the reach of this Court's decision in *Town of Hallie* and prevent the erosion of the active-supervision requirement as a condition for allowing antitrust immunity to private, nongovernmental actors.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-2849

ELDON FUCHS, et al.,

On their behalf and on behalf
of all persons similarly situated

Plaintiffs-Appellants,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY and MARY E. BUSHNELL, CHAIRMAN OF THE ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.
No. 86-3031—**Richard Mills**, *Judge.*

ARGUED APRIL 20, 1988—DECIDED SEPTEMBER 20, 1988

Before BAUER, *Chief Judge*, COFFEY, and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* Rural Electric Convenience Cooperative ("RECC") signed an agreement with Central Illinois Public Service Company ("CIPS") dividing service areas pursuant to the Illinois Electric Supplier Act. Plaintiff customers, who are member-owners of RECC, contend that defendants violated the antitrust laws by engaging in horizontal market division and monopolization. The

district court granted defendants' motions for summary judgment and to dismiss on the ground that defendants' activities constituted state action exempting[1] them from liability under the antitrust laws. We affirm.

I.

RECC is an unregulated, not-for-profit Illinois corporation, owned by nearly 5,000 consumer-members and governed by an elected board of directors. It is an "electric cooperative" as defined in § 3-119 of the Illinois Public Utilities Act ("PUA"), Ill. Rev. Stat. ch. 111⅔, para. 3-119, and § 3.4(b) of the Illinois Electric Supplier Act ("ESA"), Ill. Rev. Stat. ch. 111⅔, para. 403.4(b). RECC is one of seven local power distribution cooperatives which are members of Western Illinois Power Cooperative ("WIPCO"), a generation and transmission cooperative that provides wholesale power to its members.[2] RECC was formed in

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[1] Although state action is not truly an "exemption" or an "immunity" from the federal antitrust laws, but rather is conduct not subject to those laws, for convenience we use these terms to describe the defendants' status in this case.

[2] WIPCO's "sole function is to supply electricity to its member cooperative systems at wholesale. . . . It is owned by seven electric distribution cooperatives, and its board of directors is comprised of representatives of these corporations." *Western Illinois Power Coop., Inc. v. Property Tax Appeal Board*, 29 Ill. App. 3d 16, 331 N.E.2d 286, 288 (1975). Apparently, in the late 1970's, WIPCO and another cooperative negotiated with the Illinois Power Company to acquire an ownership interest in the new Clinton Nuclear Power Plant. "[T]he REA has urged participation by federated cooperatives [such as WIPCO] in agreements involving the joint ownership and operation of large-scale generation facilities," especially nuclear power plants. *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1360-61 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538 (11th Cir. 1988). As a part owner of Clinton, WIPCO was responsible for part of the financing of the plant, which experienced substantial cost overruns during construction. Although the record on appeal contains no information about WIPCO's costs and their effect on RECC's rates, the rates WIPCO charges RECC

(Footnote continued on following page)

1936 with a loan from the Rural Electrification Administration ("REA") pursuant to the Rural Electrification Act, 7 U.S.C. §§ 901-916. Congress authorized the REA to provide low interest, federally-insured loans and loan guarantees, preferably to cooperatives and government entities,[3] to facilitate the electrification of rural America. *See generally City of Mount Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 271-72 (8th Cir. 1988); *Salt River Project Agr. Dist. v. Federal Power Comm.*, 391 F.2d 470, 473 (D.C. Cir.), *cert. denied*, 393 U.S. 857 (1968). RECC is not a public utility under Illinois law. PUA § 3-105.c.2.

CIPS is a regulated, investor-owned public utility under § 3-105 of the PUA. Its retail electric rates are regulated by the Illinois Commerce Commission ("ICC"). PUA §§ 4-101, 9-101 *et seq.*[4]

In 1965, Illinois passed the ESA, essentially giving legal sanction to the state's natural electric utility monopolies.[5] The legislature stated that the Act furthered the public interest "to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in

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[2] *continued*

and its other member cooperatives may have risen commensurately with its increased financial obligation to the Clinton project. *See Fuchs*, 672 F. Supp. at 1112 n.2. This may be the root cause of plaintiffs' complaints about their rates. *See infra* note 7.

[3] 7 U.S.C. § 904.

[4] The plaintiffs also brought suit against Mary Bushnell, Chairman of the Illinois Commerce Commission, presumably under the theory that the Commission should not have approved the service area agreement or should have regulated the prices charged by RECC.

[5] "An industry or activity is said to be a natural monopoly if production is most efficiently done by a single firm or entity." R. Schmalensee, *The Control of Natural Monopolies* 3 (1979). *See, id.* at 3-7, 89-99. High fixed costs and economies of scale prevent the survival of competition in the marketplace. *See Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1563 (5th Cir. 1984), *cert. denied*, 474 U.S. 1053 (1986).

inconvenience and diminished efficiency in electric service to the public. . . ." ESA § 402. Consequently, the ESA "set forth a comprehensive scheme for determining which of two or more contending suppliers is entitled to serve a given customer or location." *Rural Elec. Convenience Coop. v. Illinois Commerce Comm.*, 75 Ill. 2d 142, 387 N.E.2d 670, 672, 25 Ill. Dec. 794 (1979). Under the Act, both public utilities such as CIPS and electric cooperatives such as RECC are defined as "electric suppliers." ESA § 403.5. The Act effectively froze the status quo of Illinois electric service. It forbid the construction of new lines or the extension of service to customers and areas served by other suppliers except by written consent of the other supplier, subject to the approval of the Illinois Commerce Commission (ICC). ESA §§ 405, 407. To facilitate this scheme, the Act provides that "[a]ny 2 or more electric suppliers may contract together [subject to ICC approval] defining and delineating, as between themselves, one or more service areas in which each such contracting supplier shall be entitled to furnish service." ESA § 406.

CIPS and RECC entered into such an agreement on February 19, 1969. The ICC issued its approval on April 29, 1969, finding that the agreement was in the public interest and complied with the ESA. Plaintiffs claim, and the district court found, that this service area agreement is a horizontal market allocation constituting a per se violation of the antitrust laws.[6] They contend that but for

[6] Defendants do not concede a per se violation, contending that the contract must be evaluated under the rule of reason. Because we find that defendants' challenged action was state action not subject to the federal antitrust laws, we do not address the issue of whether the service area agreement on its face violated the antitrust laws. The challenged restraint must be considered an act of the state pursuant to state law, and the ESA is therefore not preempted by the federal antitrust laws. *See 324 Liquor Corp. v. Duffy*, 107 S. Ct. 720, 726 n.8 (1987); *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982); P. Areeda and H. Hovenkamp *Antitrust Law* (1987 Supp.) ¶ 209.2 (*Parker* and *Rice* mandate essentially the same preemption inquiry).

this agreement, they could buy electricity from CIPS at lower rates than they now pay to RECC.[7] Defendants assert that the federal antitrust laws do not apply to them under the state action doctrine.[8]

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[7] Commissioner Bushnell points out in her brief that even in the absence of the agreement, the ESA freezes service areas. CIPS would need a certificate of public convenience and necessity under PUA § 8-406 in order to extend service to RECC's current customers. Although the primary factor in the issuance of such a certificate is cost savings to customers, PUA § 8-406(d), the existence of a similar service (RECC) in the area might preclude issuance of the certificate.

[8] This dispute is apparently but one variation of the periodic conflicts occurring between co-op customers and their electricity suppliers. When Congress enacted the REA in 1936, ninety percent of rural residents were without electric power. The REA (along with the National Rural Utilities Cooperative Finance Corporation, which provides additional financing to supplement the REA's loan and loan guarantee program) provided the loan capital for the construction of facilities, the extension of lines, and the generation and transmission of power in sparsely populated areas "which the investor-owned utilities had not found it profitable to service." *Salt River*, 391 F.2d at 473. Total cumulative government financing of rural electrification approaches $50 billion. The co-ops pay for these loans through their member/consumers' electric rates. Now that the rural electric systems are almost universally in place, but not paid for, some co-op customers are disgruntled with their rates, which necessarily reflect the amortization cost of the system.

Consequently, distribution co-ops have tried to sell their assets to neighboring investor-owned utilities, *Tri-State Generation and Transmission Assoc., Inc. v. Shoshore River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986), or to void their long-term contracts with co-op suppliers whose rates are higher than neighboring utilities. *United States v. Southwestern Electric Coop.*, 663 F. Supp. 538 (S.D. Ill. 1987). The withdrawal of any distribution co-op from the system necessarily shifts the fixed costs of the electricity (represented by the debt service) to the other members of its generation and transmission cooperative and raises the possibility of default, with potentially disastrous results for the system. *See Tri-State*, 805 F.2d at 357. It is clear that somebody will have to retire the debt of the rural electrification system; if co-op customers like plaintiffs succeed in removing themselves from the REA structure in large enough numbers to precipitate default, the costs may eventually

The district court agreed that the state action doctrine precluded plaintiffs' suit against defendants and granted RECC's and Bushnell's motions for summary judgment and CIPS' motion to dismiss. The issue on appeal is whether the court applied the proper test to determine whether defendants' activities are exempt from the antitrust laws.[9] The court held that the ESA articulated a clear and affirmatively expressed policy to displace competition, *see California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *LaSalle Nat'l Bank of Chicago v. DuPage County*, 777 F.2d 377, 381 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986), and that this was sufficient to render the service area agreement immune as state action regardless of whether the state actively supervised the contract or its effects. *Fuchs*, 672 F. Supp. at 1114. Defendants argue that the district court correctly held that active supervision was not necessary, but add that in any event the challenged service area agreement *was* actively supervised by the state. Plaintiffs contend that the court erred in not applying the active supervision test to defendants, and that there is no meaningful active supervision because RECC's rates (as opposed to the service area agreement itself) are completely unsupervised. Applying what we determine to be the appropriate test for state action immunity in this case, we affirm the district court's conclusion that defendants may not be held liable under the antitrust laws for entering into the service area agreement.

II.

The state action immunity doctrine, first enunciated in *Parker v. Brown*, 317 U.S. 341 (1943), holds that the Sherman Act does not prohibit official action by, or directed by, the state. *Patrick v. Burget*, 108 S. Ct. 1658, 1662 (1988). The doctrine has undergone substantial development and refinement over the last 45 years. Nonetheless,

[9] By "antitrust laws" we mean the federal antitrust laws referred to in § 1 of the Clayton Act, 15 U.S.C. § 12.

courts have often strained to fit cases into the prescribed analytical mold for determining whether a party's action is entitled to immunity. The Court first fully set forth a structured, two-prong test for state action in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Simply stated, private actors may be held liable under the antitrust laws unless they are acting pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition, and that policy is subject to "active supervision" by the state itself. *See 324 Liquor Corp. v. Duffy*, 107 S. Ct. 720, 725 (1987). The Court has recently clarified that state and quasi-state actors are subject to less stringent requirements than purely private actors. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). In order to identify the proper state action test to be applied to each defendant, we turn for guidance to the reasons behind the state action immunity doctrine, for its rationale must determine its scope. *See Hartigan v. Panhandle Eastern Pipeline Co.*, No. 85-2601, slip. op. at 5 (7th Cir. July 18, 1988) (*en banc*).

A.

The Supreme Court has stressed that the rationale underlying the state action doctrine is the federalist interpretation that the antitrust laws do not apply to actions of the sovereign states themselves. *See* Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941, 943 (1986). Because Congress never revealed an intent to make the states subject to antitrust limitations, the Court refused to infer this purpose.[10]

[10] Plaintiffs argue that Congress would have explicitly excluded electric cooperatives from the antitrust laws, as it did agricultural (15 U.S.C. § 17; 7 U.S.C. §§ 291-92) and fishery (15 U.S.C. §§ 521-22) cooperatives, had it intended them to be exempt. The crucial question for state action analysis, however, is whether the *state* intends to and does act in its sovereign capacity. The Supreme Court has held that Congress did not attempt to intrude on state regulatory behavior.

Parker, 317 U.S. at 351; *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 & n.9 (1985). In other words, the antitrust laws do not apply to actions of the state which restrain trade, and therefore do not preempt laws authorizing such state action.[11] Thus, state action immunity is not dependent on the wisdom or extent of state regulation, only on whether the state is actually acting to displace free competition. *See* P. Areeda and H. Hovenkamp, *Antitrust Law* (1987 Supp.) ¶ 212.1f (hereinafter "Areeda and Hovenkamp"). A court's analysis under the doctrine therefore focuses on whether it may be sufficiently confident that the state, rather than a private party hiding behind a "gauzy cloak" of state involvement, *Midcal*, 445 U.S. at 105, is the relevant actor.

When the state itself in one of its incarnations performs the challenged activity, it is ipso facto immune from the antitrust laws. Thus, the Supreme Court has held that a state supreme court making decisions on admitting persons to the state bar is immune without further inquiry. *Hoover v. Ronwin*, 466 U.S. 558 (1984). A state's governor's acts are also presumably immune, *see* Lopatka, 46 La. L. Rev. at 1039-40, although the Court has yet to say so. Once it is determined that the action is taken by the state itself, whether or not pursuant to some clear state policy, courts need not engage in any further inquiry—they must dismiss the federal antitrust claim. *See* Areeda and Hovenkamp ¶¶ 212.1c, 212.6.

Municipalities exist under the laws of a state, but are not sovereign in and of themselves. *Hallie*, 471 U.S. at 38. The Court has therefore held that to be immune from the antitrust laws[12] municipalities must be acting pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. *Midcal*, 445 U.S. at 105. The state policy need not compel the municipality to take

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[11] *See supra* note 6.

[12] The Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, immunized municipalities from antitrust damages liability.

the challenged action; it is enough that anticompetitive effects are reasonably foreseeable consequences of the state's grant of authority. *Hallie*, 471 U.S. at 42. Nothing more is required to ensure confidence that the acts of a municipality should be shielded as acts of the state, because a municipality lacks the attributes and incentives of private actors, and does not pose the danger of private price-fixing that the antitrust laws were intended to prevent.

State agencies, although not tantamount to the state itself, are instrumentalities of the state which are necessary to implement state policies. The Supreme Court has declined to hold whether agencies must be actively supervised by the state, although it has noted that such a requirement is unlikely. *Id.* at 46 n.10. Perhaps because it is "not easy to imagine just how a state in practice would go about supervising its agencies," Lopatka, 46 La. L. Rev. at 1040-41, lower courts have held that such agencies are beyond the reach of federal antitrust restrictions as long as their anti-competitive activities were reasonably foreseeable. *See Wicker v. Union County Hosp.*, 673 F. Supp. 177, 186 (N.D. Miss. 1987) (hospital was government agency immune if acting pursuant to clearly articulated state policy); *Humana of Illinois, Inc. v. Board of Trustees of Southern Illinois Univ.*, 1986-1 Trade Cas. (CCH) ¶ 67,127 (C.D. Ill. 1986) (state university was state agency requiring only clear articulation prong); *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1383 (N.D. Ga. 1986), *aff'd on other grounds*, 844 F.2d 1538 (11th Cir. 1988) (electric authority composed of 46 Georgia municipalities and one county was state agency immune without regard to state supervision).

The state may, and often must, also turn to private actors to effect its policies. While the state itself is immune from any actions or agreements which would violate the antitrust laws, its purposes would be thwarted if the instrumentalities chosen to implement its policies could be held liable. *Patrick*, 108 S. Ct. at 1662.

> If *Parker* immunity were limited to the actions of public officials . . . a state would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the state officials who implement the plan.

Southern Motor Carriers, 471 U.S. at 56-57. *See also Cine 42nd Street Theater v. Nederlander Org.*, 609 F. Supp. 113, 119 (S.D.N.Y. 1985), *aff'd* 790 F.2d 1032 (2d Cir 1986). The Supreme Court has therefore found that private parties may be immune, but only if they meet a more stringent two-part test. This test is designed to determine whether a private party is acting as an instrument of the state, or whether that individual or entity is hiding behind a "gauzy cloak" of state involvement to pursue anticompetitive private interests antithetical to the antitrust laws. *Midcal*, 445 U.S. at 106. Not only must private parties show that the state clearly authorized their conduct, but also that the state actively supervised the allegedly anticompetitive policy. Without such supervision, the Supreme Court has determined, courts cannot be confident that private parties are carrying out the avowed policy of the state rather than abusing the state grant of authority to pursue their own ends. The active supervision requirement "serves essentially an evidentiary function." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). It provides a "realistic assurance that a private party's anticompetitive conduct promotes state policy." *Patrick*, 108 S. Ct. at 1663. *Cf.* Lopatka, 46 La. L. Rev. at 1002-03 (arguing that there is no strong justification for an active supervision requirement); Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federation*, 75 Calif. L. Rev. 227, 249-50 (1987) (arguing that an active supervision requirement promotes the federalist value of citizen participation in government).

In the present case, the district court held that under the rationale for state action immunity clarified in *Hallie*, defendants were shielded from liability without regard to

active supervision by the state. In *Town of Hallie*, four unincorporated townships sued the adjacent city of Eau Claire for acquiring a monopoly over sewage treatment services and for tying such services to sewage collection and transportation. The Court found that a Wisconsin statute authorizing a city to "fix the limits" of its public services in unincorporated areas and providing that "the municipal utility shall have no obligation to serve beyond the area so delineated" constituted a clearly articulated state policy to displace competition. The Court then considered whether active supervision was needed to render the conduct immune as state action. The Court reasoned that the supervision requirement served the evidentiary function "of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Id.* at 46. Because private parties engaging in anticompetitive activity are likely to be acting in their own interest, the Court imposed the supervision requirement "to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the state, actually further state regulatory policies." *Patrick*, 108 S. Ct. at 1663. In other words, it "is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the . . . state policy at stake." *Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985). The *Hallie* Court held that there was "little or no danger" that a city such as Eau Claire was "involved in a *private* price-fixing arrangement." *Hallie*, 471 U.S. at 47 (emphasis in original). Eau Claire was therefore immune from antitrust attack despite the lack of state supervision over the city's sewage services.

B.

There is no question that RECC and CIPS entered into, and the ICC approved, the service area agreement pursuant to "a clearly articulated and affirmatively expressed

policy to displace competition." As the district court stated, one could hardly envision a statutory scheme that evinces a clearer, more affirmative intent. *Fuchs*, 672 F. Supp. at 1113. The problem in this case is to determine whether, or to what extent, the defendants are subject to both the clear articulation and active supervision prongs of the state action immunity test.

In antitrust cases, courts have often found it difficult to determine whether actors should be treated as public agencies or private entities. The dividing line is neither sharply drawn nor easily perceived. *See* Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349 (1982). In *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987), a charter airline operator charged the port authority with unreasonable exclusive dealing because it allowed only certain ground services companies to operate out of the terminal that the charter's airplanes were required to use. The court held Massport immune under the state action doctrine because it was authorized by the legislature to set policies on who would use or service which terminal, irrespective of whether the port authority's actions pursuant to the policy were supervised by the state. "Even if Massport is not the state itself, it at least is equivalent to a municipality. The Supreme Judicial Court [of Massachusetts] has explicitly recognized that Massport resembles a municipal corporation and that Massport 'is in no sense a private or business corporation.' " *Id.* at 13 (citation omitted). The court noted that Massport possessed attributes of a governmental entity, including "the power of eminent domain, rulemaking authority, bonding authority, and tax exempt status." *Id.*

Similarly, in *Ambulance Serv. of Reno, Inc. v. Nevada Ambulance Serv.*, 819 F.2d 910 (9th Cir. 1987), a private ambulance services corporation sued defendant REMSA (a charitable Nevada corporation formed at the direction of the county board of health) and the county board for granting REMSA an exclusive franchise of emergency medical services. The Ninth Circuit found that the Nevada

legislature expressly authorized the granting of an exclusive franchise to REMSA. In ruling that active supervision by the state was not a necessary precondition to state action immunity, the court wrote that REMSA could not be neatly characterized as either a private entity or the mere instrument of the board of health. "REMSA is not a private non-governmental entity that can be expected to pursue its own economic interests to the prejudice of the public . . . [but] it is neither a city, a county, nor the . . . Board of Health. Its interests are not precisely the same as theirs. REMSA falls somewhere between. . . ." *Id.* at 913. The court concluded that REMSA was "much closer" to the municipality in *Hallie* than the private actors in *324 Liquor. See also Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1290 (11th Cir. 1986) (county aviation authority "analogous to a municipality" and therefore immune from antitrust attack, without regard to active supervision requirement, where legislature authorized the granting of an exclusive limousine operator's license to and from airport).

We therefore focus on defendants' attributes to determine whether they are the state, a state agency, or an "arm of the state" which may be presumed to act in the public interest, *see Hallie*, 471 U.S. at 45, or whether, like private parties, they might seek to further their own interests at the expense of state goals. Defendant Bushnell is being sued in her official capacity as Chairman of the ICC, an Illinois state agency, PUA § 2-101 *et seq.*, which approved the service area agreement pursuant to a clear state policy. ESA § 406. She is therefore immune from liability as a state actor.

Defendant RECC does not fit easily into any clear category on the continuum from private to public. *See* Areeda and Hovenkamp, ¶ 212.6 (noting "pervasive vexatiousness of this question"). It is neither a state agency, a municipality, nor a purely private actor. Plaintiffs charge RECC with horizontal market allocation and monopolization, and contend that there can be no adequate supervision of the

market division "policy" without price supervision focusing on RECC's rates. We recognize that a pointed re-examination of market conditions is necessary to constitute active supervision of private parties. We hold that RECC should not, however, be subject to such a stringent standard.

The district court found RECC analogous to a municipality and therefore held that active supervision was not required under *Hallie*. We agree with the district court that RECC cannot be characterized as a purely private actor. Unlike private actors who seek to further their own interests and will exploit market factors to reap the highest possible profits, rural electric cooperatives are in some sense "instrumentalities of the United States." *Alabama Power Co. v. Alabama Elec. Coop., Inc.*, 394 F.2d 672, 677 (5th Cir.), *cert. denied*, 393 U.S. 1000 (1968). *See Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1571-72 (5th Cir. 1984) (Higginbotham, J., concurring specially), *cert. denied*, 473 U.S. 1053 (1986). RECC is a not-for-profit corporation which charges no more than necessary to cover the cost of electricity from WIPCO plus debt service and expenses. *Fuchs*, 672 F. Supp. at 1114. Its by-laws dictate that all excess amounts must be refunded to member/owner/customers. *Id.* RECC's only purpose is to provide power to its members as cheaply as possible consistent with the requirements of its REA financing. Moreover, if it pursues its own "interests" (whatever these might be) to the detriment of its owners, antitrust law seems an odd vehicle for relief. All of the shareholders of a corporation do not typically come together to sue their corporation for harm it does to them; rather than sue themselves, they act together to form new management and set new policies. As the district court noted, grievances of this type are best resolved in the board room or "through the legislature, not in litigation." *Fuchs*, 672 F. Supp. at 1116.

We do not believe, in light of RECC's non-private attributes, that it should be subject to the same state action analysis applicable to a purely private party. However, it is neither a municipality nor a state agency. Although

RECC has the power of eminent domain (ESA § 413), it is not a body politic like a municipal corporation and is not subject to public scrutiny through sunshine laws or the political process. *See Hallie*, 471 U.S. at 45 n.9. It is a hybrid entity with sufficient non-private attributes that its activities require some lower level of supervision to ensure that it is acting pursuant to state policy. *See* Areeda and Hovenkamp ¶ 212.9f.

We hold that when an entity charged with an antitrust violation is neither a municipality nor a state agency but does not have the attributes of a purely private actor, it may be held immune as a state actor without the active scrutiny of market conditions which is a necessary prerequisite for holding a private entity immune. Under the ESA, the ICC approves the agreement, resolves all disputes under it, and has the power to enforce compliance with its rulings. ESA §§ 407-416. In light of RECC's attributes, the scheme providing ICC supervision of the service area agreement constitutes adequate assurance that RECC is acting to implement state policy. RECC is therefore immune from antitrust liability as a state actor.

Defendant CIPS is a private entity charged, like RECC, with entering into an agreement to divide markets and a "refusal to deal" on the basis of that agreement. There is no allegation that CIPS' rates are unsupervised or excessive (indeed they are claimed to be preferable to RECC's rates). CIPS is a public utility subject to the full panoply of ICC regulation. It acted pursuant to clear state policy, and its alleged anticompetitive conduct—the agreement—is actively supervised by the ICC. To the extent that the inquiry into CIPS' immunity must focus on the prices charged by RECC, we have already held that RECC is not involved in the kind of private price fixing forbidden by the antitrust laws. Therefore, CIPS may not be held liable for such price fixing. Further, it would be anomalous to hold CIPS alone liable for rates charged by an unregulated electric supplier on the basis of an agreement largely mandated by and supervised by the state. As to CIPS, therefore, the challenged restraint is clearly articulated

and the "policy" actively supervised within the meaning of *Midcal*.

The decision of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ELDON FUCHS, et al.,
Plaintiffs,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., et al.,
Defendants.

No. 86-3031

FILED

OCT 30 1987

JOHN M. WATERS, CLERK
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILLINOIS

OPINION ORDER

MILLS, District Judge:

Is the Illinois Electric Supplier Act unconstitutional?

Does the power service agreement thereunder violate the Sherman Antitrust Act?

No–to both inquiries.

This action is before the Court on Rural Electric Convenience Cooperative's motion for summary judgment and Central Illinois Public Service Company's motion to dismiss under Fed. R. Civ. P. 56 & 12(b) (6) respectively. The pertinent facts are not disputed, and these motions are consolidated for purposes of ruling.

I

Central Illinois Public Service Company (CIPS) is a public utility regulated by the Illinois Commerce Commission (ICC). Rural Electric Convenience Cooperative (RECC) is an unregulated, not-for-profit corporation engaged in the retail distribution of electrical power to its

members.[1] Plaintiffs are member-owners and customers of RECC.

In 1969, CIPS and RECC, pursuant to the Illinois Electric Supplier Act, Ill. Rev. Stat. ch. 111 2/3, ¶406, entered into an agreement which divided up service areas. In compliance with the act, the ICC reviewed and approved the contract. RECC now exclusively services the area where Plaintiffs live at electric rates higher than those charged by CIPS.[2] Because of the contract, CIPS refuses to ser-

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[1] In 1936, Congress passed the Rural Electrification Act, 7 U.S.C. §901-950, and authorized the Rural Electrification Administration to make loans to electrify rural America. Investor-owned utilities, however, did not take the initiative in extending electric service to most rural areas. As a result of the need for rural electrification in Illinois, RECC, among other cooperatives, was formed in 1936, obtained a $260,000 REA loan, and, in 1937, energized its initial 134 miles of distribution lines serving 395 member-owners. RECC now serves over 4,800 member-owners with 1,200 miles of distribution lines.

[2] RECC is a member cooperative of Western Illinois Power Cooperative (WIPCO). WIPCO is a generation and transmission cooperative which has the responsibility for providing wholesale power to RECC and six other rural electric cooperative associations. In the late 1970s, WIPCO and Soyland Power Cooperative (a generation and transmission cooperative serving 15 rural electric cooperatives) negotiated with the Illinois Power Company to participate in the ownership of the Clinton Nuclear Plant to assure a stable supply of power and energy to their members at reasonable rates. WIPCO now owns 9.5% of the Clinton plant and is thereby obligated to partially finance it. Since construction began on the plant, interest rates have risen sharply and the Three Mile Island disaster prompted new federal regulations which changed construction and engineering plans already in progress. These factors greatly increased the cost of completion, thereby raising WIPCO's financial obligation. The plant was originally scheduled for completion at a cost of $430 million; however, that figure has risen to at least $4.25 billion. Although WIPCO has put a cap of $450 million on the Clinton investment, its involvement in this project has caused rates to be higher than they otherwise would have been.

vice RECC customers. Due to that refusal, Plaintiffs not only seek damages and an injunction against the retailers invalidating the contract under §§1 and 2 of the Sherman Act but also a declaration that the Electric Supplier Act is unconstitutional as violative of the Supremacy Clause.

II

Undoubtedly, the horizontal market allocation in which the suppliers have engaged is a *per se* violation of applicable federal antitrust laws. *See Gainesville Utilities Dept. v. Florida Power & Light Co.*, 573 F.2d 292, 299 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978). The ultimate issue then is whether the Sherman Act applies to the service area agreement between RECC and CIPS. Defendants assert that the agreement is immune from antitrust scrutiny under the state action doctrine enunciated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943).[3] Plaintiffs contend otherwise.

In *Parker*, a California raisin producer challenged the state's Agricultural Prorate Act under which a cartel of private raisin producers was created to stabilize prices and prevent economic waste. The Court, relying on principles of federalism and state sovereignty "refused to construe the Sherman Act as applying to the anti-competitive conduct of a State acting through its legislature. . . . Rather, it ruled that the Sherman Act was intended to prohibit *private* restraints on trade, and it refused to infer an intent to 'nullify a state's control over its officers and agents' in activities directed by the legislature." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985). Thus, the

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[3] As we find review under *Parker* to be proper course, analysis under *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), is necessarily inapplicable. In *Rice*, the Court addressed the question of when a state law would be preempted by federal antitrust law.

state action doctrine arose as an exception to antitrust law.[4]

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 413 (1978), a suit involving a municipally run electric utility system, the Court enunciated what has become known as the two-prong test of the state action doctrine. Thereafter, in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court applied the *Lafayette* test to a case where the state action exemption was claimed by a private party. In *Midcal*, the plaintiff challenged California's resale price maintenance and price posting statutes for the wholesale wine trade. The Court, quoting from *Lafayette*, stated that for the state action doctrine to apply, the challenged restraint (1) must be one clearly articulated and affirmatively expressed as state policy, and (2) must be actively supervised by the state. *Id.* at 105.

In *LaSalle Nat'l Bank of Chicago v. DuPage County*, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2892 (1986), the Seventh Circuit stated of the test's first prong: "[T]he state need not specifically authorize conduct with anti-competitive effects. . . . It is sufficient that anti-competitive effects are a foreseeable consequence of engaging in the authorized activity." *Id.* at 381. Although *LaSalle* involved suit against a local government, its principles with respect to the first prong of the test are fully applicable here. *Cf. Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1984) (extending *Parker* rationale to suits against private parties).

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[4] "Although *Parker* involved an action against a state official, the Court's reasoning extends to suits against private parties." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1984).

A. State Policy

In the instant case, the challenged restraint is the Illinois Electric Supplier Act. The legislature expressly declared its purpose as follows:

> The General Assembly declares it to be in the public interest that, in order to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in inconvenience and diminished efficiency in electrical service to the public, any 2 or more electric suppliers may contract, subject to the approval of the Illinois Commerce Commission, as to the respective areas in which each supplier is to provide service.

Ill. Rev. Stat. ch. 111 2/3, ¶402 (1985). To further this intent, the legislature stated: "Any 2 or more electric suppliers may contract together defining and delineating, as between themselves, one or more service areas in which each such contracting supplier shall be entitled to furnish service. Such contracts are subject to the approval of the Commission." *Id.* ¶406.

The above section sufficiently illustrate a "clearly articulated and affirmatively expressed" state policy to displace competition. But the legislature did not stop there. In ¶407 of the Act, the legislature prohibited, except under certain enumerated conditions, electric suppliers from making extensions of existing lines or constructing new lines for the purpose of serving new customers not yet covered by an area allocating agreement as set out in ¶406. Further, ¶408 provides for a hearing before the Illinois Commerce Commission between competing suppliers in which the Commission is to choose one, and only one, supplier to service a particular area.

One can hardly envision a statutory scheme which more clearly articulates and affirmatively expresses a state policy to displace competition. Electric utilities are generally acknowledged as a natural monopoly. *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1563 (5th

Cir. 1984). What the Illinois legislature did in the Electric Supplier Act was to codify this notion. To require more of the General Assembly, this Court would have to hold that the "legislature must expressly state in a statute or its legislative history that it intends for the delegated action to have anti-competitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written." *Town of Hallie*, 471 U.S. at 43.

Thus, the Court finds that the challenged restraint is a clearly articulated and affirmatively expressed state policy to displace competition and therefore satisfies the first prong of the *Lafayette-Midcal* test.

B. Active Supervision

As mentioned, the second prong of the *Lafayette-Midcal* test for state action doctrine immunity requires the state's active supervision of the affirmatively expressed state policy. In certain situations, however, this prong need not be satisfied for the state action doctrine to apply. In *Town of Hallie*, four unincorporated townships brought suit against the City of Eau Claire contending that the city violated the Sherman Act by acquiring a monopoly over the provision of sewage treatment services and by tying the provision of such services to the provision of sewage collection and transportation services. The Supreme Court held that "the active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Id.* at 46. The Court so held for the following reasons:

> [T]he requirement of active state supervision serves essentially an evidentiary function: it is one way of insuring that the actor is engaging in the challenged conduct pursuant to state policy. In *Midcal*, we stated that the active state supervision requirement was necessary to prevent a State from circumventing the Sherman Act's proscriptions "by casting . . . a gauzy cloak of state involvment over what is essentially a private price-fixing arrangement." 445 U.S. at 106. Where a private

> party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy.

Id. at 46-47.

Similarly, the instant case involves a not-for-profit utility owned by Plaintiffs. This is not a private, for-profit venture which is seeking to further its own interests. Like the situation involving a municipality, absolutely no danger of a private price-fixing agreement exists. The cooperative merely sets rates according to the cost of the energy plus debt service and operating expenses actually incurred. Further, through credits paid to a capital account, each patron is refunded amounts paid "in excess of operating costs and expenses." *Rural Electric Convenience Cooperative By-Laws*, art. VII, §2.[5] Thus, lack of a profit motive coupled with the fact that the cooperative is owned by the very people challenging its unregulated existence, leads to the conclusion that the cooperative does not run afoul of the Sherman Act.

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[5] Plaintiffs' argument that the credits to the capital account are not paid back to the owner-members for many years after they are earned is of no moment since the decision to disburse such funds lies with the Board of Directors–which, of course, serves at the whim of the member-owners. Further, the member-owners are free to structure and amend their by-laws as they see fit.

Judge Higginbotham, of the Fifth Circuit, has stated:

> In our economic system, private business enterprises are presumed to respond predominantly, if not exclusively, to the profit motive. By contrast, the concept of "profit" *per se* is alien to the purposes of a unit of government. Consequently, the clash of interests necessitating an antitrust law–the private desire to reap extra-normal profits versus the public interest in free competition–will not appear in its traditional form when the accused antitrust conspirator is a governmental entity.

Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1571-72 (5th Cir. 1984) (Higginbotham, J., concurring specially), *cert. denied*, 474 U.S. 1053 (1986). The same argument could be made by simply substituting "not-for-profit electric utility" for "unit of government" and "governmental entity."

In support of this view, the Court of Appeals for the District of Columbia Circuit has stated that, although not-for-profit electric cooperatives enjoy a free hand in rate making,

> by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit. Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn any profit.

Salt River Project Agricultural Improvement & Power Dist. v. Federal Power Comm'n, 391 F.2d 470, 473 (D.C. Cir. 1968) (footnote omitted), *cert. denied*, 393 U.S. 857

(1968).[6] This view fully supports the extension of the *Town of Hallie* rationale to cover electric cooperatives. Where there is no danger of private price fixing agreements (and thus no transgression of the Sherman Act), there is no need for active state supervision.

Further support is found in *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir. 1987). There, the Massachusetts Port Authority (Massport) was created by the Massachusetts legislature to operate Logan Airport. In holding Massport immune from antitrust scrutiny, the First Circuit determined that Massport "resembles a municipal corporation." Therefore, it needed only to show that it acted pursuant to clearly articulated states policy and not that it was actively supervised by the state under the supreme Court's decision in *Town of Hallie*. The Court based its decision, in part, on findings by the Supreme Judicial Court of Massachusetts that Massport was "in no sense a private or business corporation" and "[o]nly the public is to be benefited" by its existence. *Id.* at 13; *see also Interface Group, Inc. v. Massachusetts Port*

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[6] Plaintiffs point to *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n* 461 U.S. 375, 394 (1983), wherein the Court stated that "there is evidence that even cooperative power utilities *may* engage in economically inefficient behavior." *Id.* at 394 (citing R. Schmalensee, The Control of Natural Monopolies (1979)) (emphasis added). A close reading of Schmalensee's work indicates that to say cooperatives *may* engage in inefficient economic behavior is tantamount to saying that the world *may* end tomorrow–yes, it could happen, but we do not have any empirical data on it yet. Schmalensee flatly states: "Experience with cooperative ownership structures in natural monopoly sectors is not extensive." *Id.* at 89. He further states: "Very little empirical work has been done on cooperatives. In particular, the politics and economies of rural electric and telephone cooperatives have been little studied. . . ." *Id.* at 91. However, even granting the proposition that cooperatives *may* engage in economically inefficient behavior in no way suggests that they engage in private price fixing agreements.

Auth., 631 F. Supp. 483 (D. Mass. 1986) (quoting *Opinion of the Justices*, 334 Mass. 721, 734 (1956)).

The not-for-profit electric cooperative in the case at bar is likewise analogous to a municipality for antitrust purposes. As the Supreme Court stated in *Town of Hallie*, "there is little or no danger that it is involved in a *private* price fixing agreement." *Town of Hallie*, 471 U.S. at 47. This statement would seem to have even more applicability where, as here, the consumers to be protected against such private agreements are the owners of the corporation involved. To say that state supervision is necessary in this situation is to say that the member-owners need the state to tell them not to make a private price fixing agreement against themselves. Such a holding would do violence to reason and common sense.

III

Clearly, the impetus for Plaintiffs' suit against RECC is the relatively high electric rates its member-owners must pay. Just as clear, however, is the fact that these high rates are not the result of price fixing–the evil against which the Sherman Act protects. It is not the Court's nor the Sherman Act's concern if the cooperative's prices are relatively high. Keeping prices down is a problem to be solved by the member-owners as best they can at board meetings and the like or through the legislature, not in litigation.

Thus, the Court determines that, having passed the first prong of the *Lafayette-Midcal* test, RECC and CIPS are entitled to exemption from the federal antitrust laws under the state action doctrine.

Finding no transgression of the Sherman Act (and therefore none of the supremacy clause), the Court finds no merit in Plaintiffs' argument that the Electric Supplier Act is unconstitutional.

Ergo, for the reasons given above, Defendant Central Illinois Public Service Company's motion to dismiss is ALLOWED and Defendant Rural Electric Convenience Cooperative's motion for summary judgment is also ALLOWED. Consequently, Plaintiffs' motion to certify as a class is DENIED as moot.

ENTER: 29 October, 1987.

FOR THE COURT:

/s/ RICHARD MILLS

RICHARD MILLS
United States District Judge

APPENDIX C

In The United States District Court
Central District of Illinois
Sringfield Division

ELDON FUCHS, et al.,
Plaintiffs,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., et al.,
Defendants.

No. 86-3031

FILED

NOV 2 1987

John M. Waters, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILLINOIS

ORDER

MILLS, District Judge:

This action is before the Court on Plaintiffs' motion for summary judgment pursuant to Fed. R. Civ. p. 56. Defendants have previously filed a motion for summary judgment and motion to dismiss, respectively, which are addressed simultaneously in a separate opinion order (referred to herein as "previous order").

The Court addresses this motion with some hesitation as it was previously Plaintiffs' position (in their reply to Defendant's motion for summary judgment) that this cause is not disposable on summary judgment motion because there are disputed issues as to material facts. This inconsistency is Plaintiffs' positions notwithstanding we will briefly address the merits of the present motion.[1]

[1] The Court addresses this motion without the benefit of Defendants' reply memoranda which, in light of our disposition, are unnecessary.

In their memorandum, Plaintiffs make no new arguments with respect to the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), which is at the heart of this dispute. They state the issues as follows: "(1) is it the policy of Illinois to restrain trade by the creation of unregulated electric supply territorial monopolies and, if so, (2) does the State of Illinois actively supervise the anticompetitive effects of that policy."

Initially, Plaintiffs refer to the first prong of the state action test under which the challenged restraint must be one clearly articulated and affirmatively expressed as state policy. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Plaintiffs argue that "there simply is no articulated state policy of unregulated monopoly control of the sale of power to consumers. The statute is entirely silent as to that phenomenon." This contention is quickly answered by the Supreme Court's pronouncement in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), that a legislature need not "expressly state in a statute or its legislative history that it intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and how statutes are written." *Id.* at 43.

Under Plaintiffs' second stated issue, they refer to the second prong of the state action test, that the challenged restraint must be actively supervised by the state. This subject is addressed exhaustively in our previous order where we held that, in light of the Supreme Court's decision in *Town of Hallie*, no state supervision is necessary under the facts presented here.

In conclusion, we note that in Plaintiffs' argument that there is insufficient state supervision to satisfy the state action test, Plaintiffs list a number of areas which are unregulated: changes in electric rates, a requirement of just and reasonable charges, new plant construction, reasonableness of capacity to generate power, amount of

money spent on political activities, and amount of money spent on advertising. Plaintiffs further state that no regulatory agency oversees performance and efficiency of the cooperative or has the power to command the cooperative to produce its books or even examine the books. Finally, Plaintiffs argue, even the accuracy of the cooperative's meters are not checked.

The Plaintiffs bemoan the absence of regulation in these areas; however, they neglect the fact that oversight in all of the above areas is within the purview of each Plaintiff as a member-owner of the cooperative. To bring in the state to regulate these matters would be a waste of the state's resources and unnecessary in light of the cooperative's not-for-profit status. The Illinois legislature has made this determination and we are not at liberty to tinker with it.

Ergo, for all the reasons given above and those stated in our previous order, Plaintiffs' motion for summary judgment is DENIED.

CASE CLOSED.

ENTER: 30 October, 1987.

FOR THE COURT:

/s/ RICHARD MILLS
RICHARD MILLS
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ELDON FUCHS, et al.,
Plaintiffs,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., et al.,
Defendants.

No. 86-3031

FILED

NOV 09 1987

John M. Waters, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILLINOIS

ORDER

MILLS, District Judge:

This matter is before the Court on Defendant Mary Bushnell's motion for summary judgment. Defendant was named in the complaint in her capacity as Chairman of the Illinois Commerce Commission.

Pursuant to Fed. R. Civ. P. 56, summary judgment may be granted where no genuine issue as to any material fact exists. That is the case here.

By opinion order of October 29, 1987, this Court allowed motions by the other named Defendants to dismiss this cause. As the issues between Plaintiffs and this Defendant are identical to those addressed in the opinion order previously rendered, it is wholly dispositive as to this motion.

Ergo, for the reason given above, Defendant Mary Bushnell's motion for summary judgment is ALLOWED.

CASE CLOSED.

ENTER: 6 Nov., 1987.

FOR THE COURT:

/s/ RICHARD MILLS
RICHARD MILLS
United States District Judge

APPENDIX E

United States District Court

CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DE GROOT, ROBERT A. DIXON, KENNETH E. HAUBOLD, PAUL A. HENDRICKS and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated.

vs.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE CO., and MARY E. BUSHNELL, CHAIRMAN OF THE ILLINOIS COMMERCE COMMISSION, an agency of the State of IL.

No. 86-3031

FILED

NOV 2 1987

John M. Waters, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILINOIS

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Pursuant to orders entered by the Honorable Richard Mills, Defendant Central Illinois Public Service Company's motion to dismiss is allowed and Defendant Rural Electric Convenience Cooperative's motion for summary judgment is also allowed. Plaintiffs' motion for summary judgment is denied.

11/9/87
AMENDMENT
Pursuant to Order entered by The Honorable Richard Mills, Deft Mary Bushnell's motion for summary judgment is allowed.

JOHN M. WATERS
UNITED STATES DISTRICT CLERK

/s/ GLORIA UTSINGER
Deputy Clerk

FILED

NOV 09 1987

John M. Waters, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILINOIS

November 2, 1987
Date

/s/ JOHN M. WATERS
Clerk

/s/ CHRISTY TAYLOR
(By) Deputy Clerk

APPENDIX F

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 17, 1988

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

ELDON FUCHS, et al., On their behalf and on behalf of all persons similarly situated,
Plaintiffs-Appellants,

No. 87-2849 *vs.*

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY and MARY E. BUSHNELL, CHAIRMAN OF THE ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.

No. 86-3031

Richard Mills, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
MAR 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DeGROOT, KENNETH E. HAUBOLD, RICHARD HAUBOLD, PAUL A. HENDRICKS, and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, and MARY E. BUSHNELL, CHAIRMAN of the ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT RURAL ELECTRIC CONVENIENCE COOPERATIVE CO.'S BRIEF IN OPPOSITION

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QUESTIONS ACTUALLY PRESENTED

1. Whether a non-profit rural electric cooperative subject to regulation and supervision by both the Illinois Commerce Commission and the Rural Electrification Administration is entitled to state action exemption from the Sherman Act in a case brought by cooperative members seeking antitrust damages because of rate increases arising from a nuclear plant project, where the only antitrust violation alleged involves the service area agreement authorized pursuant to state statute and reviewed, approved and supervised by a state agency.

2. Whether a service area agreement entered into pursuant to clearly articulated and affirmatively expressed state policy and reviewed, approved and supervised by a state agency loses its character as state action because the state by statute has chosen not to regulate the rates set by member owned and governed not-for-profit electric cooperatives.

3. Whether the state action exemption from the federal antitrust laws applies only if the state always regulates the rates or prices of the party seeking the exemption.

4. Whether parties claiming federal antitrust violations by a rural electric cooperative can evade the state action exemption by deliberately bypassing procedures established by the state for active supervision of the cooperative's conduct.

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No. 88-1358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DeGROOT, KENNETH E. HAUBOLD, RICHARD HAUBOLD, PAUL A. HENDRICKS, and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, and MARY E. BUSHNELL, CHAIRMAN of the ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT RURAL ELECTRIC CONVENIENCE COOPERATIVE CO.'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

I.

RECC IS ENTITLED TO STATE ACTION EXEMPTION FROM THE FEDERAL ANTITRUST LAWS AS A HEAVILY REGULATED NON-PROFIT ELECTRIC COOPERATIVE.

The Seventh Circuit correctly held that the agreement between respondent Rural Electric Convenience Cooperative Co. ("RECC") and respondent Central Illinois Public Service Company ("CIPS") dividing service areas between them pursuant to the Illinois Electric Supplier Act, Ill. Rev. Stat. ch. 111⅔, §§ 401 *et seq.* ("ESA"), was exempt from the federal antitrust laws under the state action doctrine. Based upon undisputed facts, the Court of Appeals' reliance on the following factors was fully warranted:

(1) Petitioners admit that the RECC-CIPS service area agreement was in furtherance of a "clearly articulated and affirmatively expressed" state policy to displace competition. The Illinois Legislature passed the ESA "to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in inconvenience and diminished efficiency in electric service to the public. . . ." ESA § 402. The ESA froze the then current distribution pattern of electricity throughout the state. The Legislature prohibited the construction of new electric lines and the extension of service to new customers in areas served by other suppliers except upon the written consent of those other suppliers.

(2) In enacting the ESA, the Illinois General Assembly clearly established a policy that no customer shall be served by more than one electric supplier.

(3) On the same date that the Illinois General Assembly enacted the ESA, it also amended the Illinois Public Utilities Act to specifically exclude "electric cooperatives" from its definition of "public utility," thereby affirmatively expressing Illinois' policy not to regulate the rates of member owned and governed electric cooperatives. Illinois Public Utilities Act, Ill. Rev. Stat. ch. 111⅔, §§ 3-105, 3-119.[1]

(4) Although the RECC-CIPS service area agreement was reviewed and approved in 1969 by the Illinois Commerce Commission as in the public interest, petitioners made no attempt to have the Commission review this agreement prior to the filing of this antitrust action in 1986. The real reason for petitioners' complaint was their unhappiness with the higher rates that RECC had to charge because of the participation of RECC's principal wholesale power supplier, Western Illinois Power Cooperative, in Illinois Power Company's Clinton Nuclear Power Plant.

(5) The only restraint alleged in petitioners' complaint is the RECC-CIPS service area agreement itself. Petitioners have not alleged any antitrust violation that relates to the rates that RECC charges its consumer-members.

(6) The Illinois Legislature established elaborate procedures enabling challenges to the conduct of electric cooperatives that have entered into such service area agreements. ESA §§ 407, 408, 409, 410, 411, 412.[2]

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[1] The relevant portions of these sections of the Illinois Public Utilities Act are included in Appendix "A" to this brief.

[2] The ESA is reproduced in Appendix "B" to this brief.

(7) RECC's rates are controlled for all practical purposes by its agreements with the Rural Electrification Administration of the United States Department of Agriculture ("REA") which has financed RECC's electric distribution facilities and operations. Although REA does not "set" the rates to be charged by RECC, REA's financing agreements expressly require RECC to collect rates at sufficient levels to pay RECC's power supply, administrative and debt service expenses.

(8) RECC's only customers are its members, and they control RECC through democratic procedures. Therefore, it is exceedingly implausible that RECC's members would seek to violate the federal antitrust laws by charging themselves monopoly prices, especially since any margins above RECC's costs are automatically credited to its members' capital accounts.

Although petitioners do not and cannot legitimately dispute the foregoing facts and factors, they still maintain that the state action exemption should not apply because of an undefined conflict with this Court's prior decisions and also because petitioners maintain that the state action exemption should not apply unless the state actively regulates the rates or prices charged by the party seeking exemption. Petitioners can establish neither of these points.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR ANY OF THE CIRCUITS.

Petitioners' caption for their argument (Pet. 5) states that the Seventh Circuit decision below conflicts with this Court's prior decisions, but nowhere in the argument itself is the conflict identified. In fact, the Seventh Circuit's

decision here is clearly consistent with the state action principles previously established by this Court and uniformly applied by the lower federal courts.

Although this Court's holding in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), was confined to municipalities, the decision explained generally the relevant criteria for applying the state action exemption to non-private parties. The circuits are now applying *Town of Hallie* to cases involving parties not specifically covered by this Court's prior decisions. *See, e.g., Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987) (port authority); *Ambulance Serv. of Reno, Inc. v. Nevada Ambulance Serv.*, 819 F.2d 910 (9th Cir. 1987) (charitable corporation controlling emergency medical services in county); *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986) (county aviation authority). To date, no conflict among the circuits has developed in applying *Town of Hallie* to circumstances beyond traditional municipalities.

The *Town of Hallie* standard for applying the state action exemption to non-private parties is a pragmatic one: As long as there is a strong state policy to displace competition, the state action exemption will apply provided there is "minimal danger" under all the circumstances that the party in question "will seek to further purely parochial public interests at the expense of more overriding state goals." 471 U.S. at 47. Each of the cases falling within the so-called "hybrid" category (*i.e.*, where the party asserting the state action exemption is neither a governmental entity nor a private, profit-making entity) involves a specific determination whether the circumstances pose a significant risk that consumers will be burdened by such "parochial interests" conflicting with the state's goals.

In this case, the Seventh Circuit's judgment that no such danger is present was fully justified because RECC "does not have the attributes of a purely private actor," 858 F.2d at 1217-1218, and this does not conflict with *Town of Hallie* or any other decisions.[3]

Petitioners attempt to mislead the Court by suggesting that in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378-379 (1973), and *Montana-Dakota Utilities Co. v. Williams Electric Cooperative, Inc.*, 263 F.2d 431 (8th Cir. 1959), the state action exemption was denied to rural electric cooperatives. In fact, neither case even involved the state action exemption. In *Otter Tail*, the only defendant was a private investor-owned utility, and unlike this case, there was no state policy authorizing service area agreements between utilities. In *Montana-Dakota*, the Eighth Circuit found that a state statute actually *prohibited* the service area agreement between a private utility and a rural electric cooperative.

Petitioners completely miss the point that the state action exemption is designed to give each state the freedom to determine its own policy with respect to such matters as the desirability of competition among suppliers of electricity. The federal courts do not sit to judge whether the Illinois General Assembly's decision to allow, indeed encourage, service area agreements is wise social or economic policy. *First American Title Co. of South Dakota*

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[3] RECC has many of the same attributes as a municipality. Not only does RECC have the power of eminent domain but its management and operations are controlled by its consumer-members who elect RECC's Board of Directors. Moreover, RECC operates on a strictly not-for-profit basis charging rates sufficient only to cover its power supply, administrative and debt service costs. Any margins earned in excess of these costs are automatically credited to its members' capital accounts.

v. South Dakota Land Title Ass'n, 714 F.2d 1439, 1453 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984).

III.

PETITIONERS' CLAIM THAT THE STATE ACTION EXEMPTION SHOULD APPLY ONLY IF RATES AND PRICES ARE REGULATED BY THE STATE IS UNWARRANTED.

The only restraint that petitioners have alleged in their complaint is the RECC-CIPS service area agreement. Petitioners have not alleged that RECC's rates violate the antitrust laws. Nevertheless, petitioners ask the Court to engraft a third principle in addition to the two rules that this Court has developed in its state action case law. According to petitioners, parties seeking a state action antitrust exemption should be required to prove not only (1) a strongly expressed state policy to displace competition and (2) active supervision by the state over the restraint in question, but also (3) state regulation of the rates or prices charged by the parties seeking exemption even if the alleged restraint does not involve price-fixing or price discrimination.[4] Petitioners cite no case holding that such rate regulation is required, nor do petitioners address any of the practical problems that such a ruling would entail. For instance, would the states be required to adopt full-fledged price-setting or rate-making procedures for every party subject to the state action exemption? Would Congress or the federal courts be required

[4] Any suggestion by petitioners that RECC has unbridled discretion to set rates is plainly wrong. As a member-owned and governed not-for-profit electric cooperative subject to exhaustive REA financial controls, RECC sets rates at the minimum level necessary to pay for its power supply, administrative and debt service expenses.

to establish the factors and parameters that would govern such price-setting or rate-making? Would the exemption be sufficiently justified if the parties in question had very limited discretion over prices and rates? As these issues indicate, petitioners' position, if adopted, would entail a significant federal intrusion into state policy-making areas and continuous litigation over the question whether the state procedures were adequate.

It is clear that in this case there is no basis for holding that the failure of the state to set RECC's rates mandates denial of a state action exemption. RECC's rates are closely controlled by both the REA and RECC's own members who have to pay the rates.

RECC's rates are largely dictated by its long-term contractual obligations to set its rates sufficiently high to repay its debt to REA.[5] REA's extensive control over RECC's rates is demonstrated by *United States v. Southwestern Electric Cooperative, Inc.*, 676 F. Supp. 897, 903 (S.D. Ill. 1987), *aff'd*, No. 88-1695 (Feb. 8, 1989),[6] in which

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[5] The Federal Power Commission ("FPC") in *In re Dairyland Power Cooperative, et al.*, 37 FPC 12, 18 (1967), held that it lacked the authority to regulate rural electric cooperatives because of the "extensive and rigid supervision and control" exercised by REA over its borrowers. The FPC explained REA's control over the rates charged by cooperatives:

> "All of [the cooperative's] contracts, including those for the purchase and sale of electric energy, must be approved by REA, and by this means REA controls the rates the cooperative pays and the rates it charges."

See also Salt River Project Agr. Dist. v. Federal Power Commission, 391 F.2d 470, 473 (D.C. Cir.) *cert. denied*, 393 U.S. 470 (1968), which held "REA exercises extensive supervision over the planning, construction and operation of the facilities it finances."

[6] The Seventh Circuit's slip opinion in *Southwestern* is included in Appendix "C" hereto.

an Illinois rural electric cooperative had refused to pay higher rates caused by the same Clinton nuclear power plant in which RECC's power supplier invested. REA filed suit to enforce its contracts, and the district court held that the cooperative was contractually bound to pay the higher rates.[7]

Petitioners have also failed to identify one plausible reason RECC's members would seek to violate the antitrust laws to impose higher rates upon themselves. RECC has nothing to gain financially through setting rates since all margins in excess of actual costs are credited to its members' capital accounts. RECC has caused no injury to the public, much less the very specific type of injury that the federal antitrust laws were intended to prevent or remedy. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

IV.

PRACTICAL CONSIDERATIONS REQUIRE DENIAL OF THE PETITION.

There are significant practical reasons why this case does not present issues suitable for review by this Court.

(1) This case involves the unusual feature of extensive federal involvement through REA in regulating and supervising the operations of the party seeking the state action exemption. The state has in effect deferred to the

[7] Once REA and RECC had entered into their financing arrangements and executed contracts requiring rates to be sufficient to repay REA's loans, the state could not have required lower rates through *ex post facto* legislation. Under such circumstances, REA would be entitled to preempt rate-making so that the federal interests would be protected. *See Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm.*, 461 U.S. 375, 389 (1983).

REA with respect to rural electric cooperatives' rates. Petitioners' statement of the questions presented (Pet. i) claiming "no regulation of the rates charged" by RECC is erroneous.

(2) Petitioners deliberately bypassed procedures established by the state to raise complaints about inadequate service by a rural electric cooperative under the Electric Supplier Act. Since those procedures were established to provide active supervision over the parties entering into a service area agreement, petitioners should not be allowed to "forum shop" and then claim lack of state supervision as an excuse to overturn Illinois' entire system for regulating electric suppliers and their service areas. Undoubtedly petitioners realized that by invoking such state procedures they would admit the active supervision of the RECC-CIPS service area agreement which would, in turn, validate RECC's state action exemption.

(3) This case in essence involves complaints by disgruntled RECC members about higher rates stemming from the participation of RECC's primary power supplier, Western Illinois Power Cooperative, in Illinois Power Company's Clinton Nuclear Power Plant. Such a dispute is primarily an internal cooperative matter. Petitioners do not claim that RECC lacked authority to enter into that project, that RECC's contracts do not require higher rates to meet Clinton's costs and RECC's resulting large debt to REA, or that RECC's contracts with REA are not binding. The remedies sought by petitioners would require RECC to breach its contracts with REA and default on debt repayment.

CONCLUSION

For the above reasons, RECC asks the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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Dated: March 17, 1989

APPENDICES

APPENDIX "A"

ILLINOIS PUBLIC UTILITIES ACT

3-105. Public utility

§ 3-105. "Public utility" means and includes, except where otherwise expressly provided in this Section, every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in:

a. the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity or water;

b. the disposal of sewerage; or

c. the conveyance of oil or gas by pipe line.

"Public utility" does not include, however:

. . .

3. electric cooperatives as defined in Section 3-119 . . . .

3-119. Electric cooperative

§ 3-119. "Electric cooperative" is any electric cooperative which is subject to the Electric Suppliers Act, enacted by the 74th General Assembly, and has the same meaning as is defined in Section 3.4 of that Act.

APPENDIX "B"

ILLINOIS ELECTRIC SUPPLIER ACT

§ 401. Short title

This Act shall be known and may be cited as the "Electric Supplier Act".

§ 402. Legislative declaration

The General Assembly declares it to be in the public interest that, in order to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in inconvenience and diminished efficiency in electric service to the public, any 2 or more electric suppliers may contract, subject to the approval of the Illinois Commerce Commission, as to the respective areas in which each supplier is to provide service.

§ 403. Terms defined

As used in this Act, unless the context otherwise requires, the terms specified in Sections 3.1 through 3.17 have the meanings ascribed to them in those sections.

§ 403.1 Adequate

"Adequate" lines or facilities means having sufficient capacity to meet the maximum estimated service requirements of the customer to be served during the year following the commencement of permanent service and to meet the maximum estimated service requirements of other actual customers to be supplied therefrom during such year and to assure such customers of reasonable continuity of service. Facilities or lines are "adequate" even though the electric supplier must increase their capacity if the supplier will undertake to make its facilities and lines meet such service requirements, and can reasonably do so, within such time as meets the customer's requirements.

§ 403.2 Commission

"Commission" means the Illinois Commerce Commission.

§ 403.3 Customer

"Customer" means any person receiving electricity for any purpose from an electric supplier.

§ 403.4 Electric cooperative

"Electric Cooperative" means (a) any not-for-profit corporation or other person that owns, controls, operates or manages, directly or indirectly, within this State, any plant, equipment or property for the production, transmission, sale, delivery or furnishing of electricity and (b) that either is or has been financed in whole or in part under the federal "Rural Electrification Act of 1936" and the Acts amendatory thereof and supplementary thereto, or is directly or indirectly caused to be formed by any one or more such not-for-profit corporations or other persons that is or has been so financed.

§ 403.5 Electric supplier or supplier

"Electric Supplier" or "Supplier" means an electric cooperative or a public utility which furnishes electric service.

§ 403.6 Existing line

"Existing line" means any line of an electric supplier which on the effective date of this Act is (a) in existence or (b) is under construction, as determined in accordance with accepted engineering practices. The term includes any such line which one electric supplier may acquire from another electric supplier after such effective date.

§ 403.7 Extension

"Extension" means any new construction which increases the length of an existing line laterally or otherwise.

§ 403.8 Incorporated municipality

"Incorporated municipality" means any city, village or incorporated town.

§ 403.9 Line

"Line" means any electric line or cable whether overhead or underground.

§ 403.10 Normal service connection point

"Normal service connection point" means that point on a customer's premises where an electric connection to serve such premises would be made in accordance with accepted engineering practices. In the case of an incorporated municipality which is a customer, "normal service connection point" means that point within the corporate limits of the municipality where an electric connection to serve that municipality would be made in accordance with accepted engineering practices, or, if such connection is to be made outside the corporate limits, that point where the line from such connection crosses the corporate limits.

§ 403.11 Person

"Person" includes an individual, corporation, partnership, electric cooperative, public utility, association, joint stock company, trust, incorporated municipality, municipal corporation, and any governmental entity or political subdivision thereof.

§ 403.12 Premises

"Premises" means a physical area (a) which, except for any intervening public or private rights of way or easements, constitutes a single parcel or unit and (b) which a single customer owns, uses or in which it has some other interest in connection with receiving service at one or more points of delivery.

§ 403.13 Proximity

"Proximity" means that distance which is shortest between a proposed normal service connection point and a point on an electric supplier's line, which is determined in accordance with accepted engineering practices by the shortest direct route between such points which is practicable to provide the proposed service.

§ 403.14 Public utility

"Public Utility" has the same meaning as is defined in Section 10.3 of the Public Utilities Act.

§ 403.15 Public utilities act

"Public Utilities Act" means "An Act concerning public utilities", approved June 29, 1921, as heretofore or hereafter amended.

§ 403.16 Service

"Service" means electric service.

§ 403.17 Service area

"Service area" means that area, defined in an agreement between electric suppliers, which has been approved by the Commission, in which an electric supplier is entitled to furnish service, as provided in Section 6.

§ 404. Map of existing supplier's lines

By October 1, 1965, or within such further reasonable time as may be fixed by the Commission, each electric supplier shall make and file with the Commission such map or maps as will clearly indicate the location in this State of the supplier's existing lines. On November 1, 1965, or within such further reasonable time as the Commission may determine, the Commission shall find to be accurate those maps to which no objection has been filed

under this Section. If before November 1, 1965, or before the end of such a reasonable time period determined by the Commission, an electric supplier who may be adversely affected by an inaccurate map files with the Commission a written objection to any map, the Commission shall set a hearing on such map or maps and give reasonable notice to the electric supplier filing the map and to the supplier filing the objection. At the hearing, the Commission shall determine on the basis of the evidence presented whether or not each map is accurate. After its determination the Commission shall find to be accurate each map in question or require that a revised map, made in accordance with its determination, be promptly filed which when filed shall be found to be accurate by the Commission.

No public utility is required, however, to file a map showing its existing lines in any county in which there are no existing lines of an electric cooperative and which is not adjacent to a county in which there are existing lines of an electric cooperative; and no electric supplier needs to indicate on such a map, except as otherwise required by the Commission, any existing line which is more than 5 miles away from an existing line of another supplier.

No electric supplier is required to file a map showing its existing lines in any incorporated municipality except that, if 2 or more electric suppliers are furnishing electric service on the effective date of this Act in any incorporated municipality, each such supplier shall file a map showing the location of its existing lines in the portion of the incorporated municipality where those lines are adjacent to the existing lines of another electric supplier.

Such maps found to be accurate by the Commission as provided in this Section are public records of the Commission and are prima facie evidence of the location of the existing lines thereon portrayed.

§ 405. Furnishing service—New lines

Each electric supplier is entitled, except as otherwise provided in this Act or (in the case of public utilities) the Public Utilities Act, to (a) furnish service to customers at locations which it is serving on the effective date of this Act, (b) furnish service to customers or premises which it is not now serving but which it had agreed to serve under contracts in existence on the effective date of this Act, and (c) resume service to any premises to which it has discontinued service in the preceding 12 months and on which are still located the supplier's service facilities.

Except as otherwise provided in this Act or (in the case of public utilities) the Public Utilities Act, no electric supplier may construct new lines, or extend existing lines, to furnish electric service to a customer or his premises which another electric supplier is entitled to serve, as provided in this Section, except with the written consent of such other electric supplier subject to the approval of the Commission as to such consent, if required.

This Section does not deprive an electric supplier of any right to furnish permanent service under a contract existing on the effective date of this Act to premises receiving temporary service from another supplier on the effective date of this Act.

Nothing in this Section prevents a generation and transmission electric cooperative from furnishing service to its member distribution electric cooperatives which are not incorporated municipalities.

§ 406. Contracts between electric suppliers defining and delineating service areas

Any 2 or more electric suppliers may contract together defining and delineating, as between themselves, one or more service areas in which each such contracting supplier shall be entitled to furnish service. Such contracts are subject to the approval of the Commission.

§ 407. Extension of existing or construction of new lines—Notice to suppliers adversely affected—Complaint—Application of section

Except as otherwise provided in this Act, until the respective service areas of the affected electric suppliers have been determined as provided in Section 6, no electric supplier may make an extension of existing lines or construct new lines for the purpose of furnishing service to a customer or premises which it is not entitled to serve under Section 5, or furnish service to any customer or premises which such supplier is not entitled to serve under Section 5, unless in any such case such electric supplier gives written notice to the electric supplier or suppliers which may be adversely affected by the proposed construction, extension or service. Any electric supplier which claims that it should be permitted to serve any customer or premises which could be served by such proposed construction, extension or furnishing of service may within 20 days after receipt of such notice or, if no notice is received, not later than 18 months after the completion of such proposed construction, extension or the commencement of service, file its complaint with the Commission which shall proceed to determine the issue as provided in Section 8.

The electric supplier giving such notice may, however, commence such construction, extension or service, subject to the subsequent final determination of the Commission as to which supplier should be permitted to furnish such service.

This Section does not apply to and no notice need be given under this Section by (1) a public utility constructing new lines, extending existing lines or furnishing service in any county in which there are no existing lines of an electric cooperative and which is not adjacent to any county in which there are existing lines of an electric cooperative or constructing new lines, extending existing lines or furnishing service more than 5 miles away from an existing line of an electric cooperative; (2) a gen-

eration and transmission electric cooperative making a construction or extension of lines solely to serve its member distribution electric cooperatives which are not incorporated municipalities; (3) any electric supplier constructing new lines or extending existing lines to furnish service exclusively to its own property and for its own use; and (4) any electric supplier making, for the purpose of furnishing service to a customer, an extension of 300 feet or less of line having a voltage of 600 volts or less which does not make the service of that supplier any nearer to the existing lines of another supplier than at the effective date of this Act.

§ 408. Hearing and determination as to which of suppliers should furnish proposed service

When a complaint has been filed as provided in Section 7, the Commission shall proceed, after reasonable notice to the suppliers concerned, to a hearing to determine which of the suppliers is entitled or should be permitted under this Act to furnish the proposed service. The Commission shall first determine whether temporary service should be authorized and may issue a temporary authorization to a supplier permitting the making of extensions and furnishing of service while the dispute is pending. The Commission shall then make its determination as to which supplier is entitled or should be permitted under this Act to furnish the proposed service. In making this determination, the Commission shall act in the public interest and shall give substantial weight to the consideration as to which supplier had existing lines in proximity to the premises proposed to be served, provided such lines are adequate. In addition, the Commission may consider, but with lesser weight, (a) the customer's preference as to which supplier should furnish the proposed service, (b) which supplier was first furnishing service in the area, (c) the extent to which each supplier assisted in creating the demand for the proposed service, and (d) which supplier can furnish the proposed service with the smaller amount of additional investment. The Commission, how-

ever, shall give no weight or consideration to the fact that any supplier has or has not been issued a certificate of public convenience and necessity in the area proposed to be served.

After making its determination, the Commission shall make findings of fact and render its decision as to which supplier is entitled or should be permitted to furnish the proposed service. The decision of the Commission constitutes an authorization to that supplier to render such service and revokes any temporary authorization granted by the Commission while the dispute was pending.

§ 409. Inadequacy of service—Discrimination—Refusal to serve—Complaint of customer—Hearing and determination

(a) Any customer receiving service from any electric supplier, which is not subject to the Public Utilities Act, who contends that he is not receiving adequate service from that supplier, or who contends that he is being discriminated against by that supplier, may complain to the Commission. If the Commission on hearing finds that the service is inadequate and that there is another supplier whose service would be adequate and who is willing to serve that customer, the customer shall be released to such other supplier unless the supplier against whom complaint is made makes its service to that customer adequate within a reasonable time to be fixed by the Commission. If there is no such other supplier the Commission may direct that service be made adequate. If the Commission finds on hearing that such customer is being discriminated against as compared with other customers of the electric supplier so supplying such customer, the Commission shall order such supplier to cease and desist from such discrimination.

(b) If any electric supplier, which is not subject to the Public Utilities Act, refuses to serve a customer whom it is obligated to serve and who has applied for service to the supplier in accordance with the supplier's standard

rules as to service, the Commission, on receiving a complaint from the customer and after a hearing thereon, may direct the supplier to serve that customer.

§ 410. Rules and regulations

The Commission shall make and adopt such reasonable rules and regulations as are necessary to enforce compliance with and to administer the provisions of this Act. Before the adoption of any such rule or regulation, or of any amendment thereof, the Commission shall set the rule, regulation or amendment for public hearing and shall give at least 30 days prior written notice of such hearing to all electric suppliers, accompanying such notice with a copy of each of the rules, regulations or amendments that the Commission proposes to adopt. The Commission shall prepare and make available to all electric suppliers, and to the public upon request, copies of all such rules and regulations and the amendments thereof.

§ 411. Enforcement of compliance with act

The Commission shall have the power and jurisdiction to, and shall, enforce compliance with this Act on complaint made by the electric supplier or customer or prospective customer aggrieved by any non-compliance with this Act and shall make such orders and take such action by appropriate court proceedings or otherwise which will secure compliance with this Act.

§ 412. Judicial review

Any final order or decision of the Commission may be reviewed as provided in the "Administrative Review Act", approved May 8, 1945, as heretofore or hereafter amended, and the rules adopted pursuant thereto.

§ 413. Eminent domain

An electric cooperative when it is found by the Commission that it is necessary so to do may proceed to take

or damage private property as provided by "An Act to provide for the exercise of the right of eminent domain", approved April 10, 1872, as heretofore or hereafter amended. The requirement of such finding by the Commission is not to be construed to require authorization by the Commission of the facility for which the authorization to use eminent domain is sought.

§ 414. Areas located within incorporated municipalities

Except as otherwise provided in this Section, Sections 5 (other than the first paragraph thereof), 7 and 8 of this Act do not apply to any area which is located within an incorporated municipality on the effective date of this Act and shall cease to apply to any area after it is annexed to or otherwise becomes located within an incorporated municipality. An electric supplier which is serving in an area which has been or hereafter becomes annexed to or otherwise located within an incorporated municipality may continue to furnish service within such annexed or otherwise incorporated area to the premises which it is serving at the time of such annexation or incorporation provided that: (i) no such supplier may extend its lines into any area previously or subsequently annexed or otherwise located within the incorporated municipality in which another electric supplier is authorized to maintain and extend its lines unless in any such case the electric supplier is or shall become authorized to do so by the incorporated municipality and the Commission; (ii) no such supplier serving in an area which has been previously annexed to or otherwise located in an incorporated municipality prior to the effective date of this Act may extend its lines within such annexed or otherwise incorporated area unless in any such case the electric supplier is or shall become authorized to do so by the incorporated municipality and the Commission; and (iii) no such electric supplier which is serving in an area which becomes so annexed to or otherwise located within an incorporated municipality after the effective date of this Act may furnish service to any additional premises or extend its lines into or within such

area unless such supplier is or shall become authorized so to do by the incorporated municipality. In making a determination under clause (i) above the Commission shall act in the public interest and shall consider all the factors set forth in Section 8 but shall not be required to give substantial weight to any particular factor and shall take into consideration any applicable certificate of public convenience and necessity. In making a determination under clause (ii) above the Commission shall act in the public interest and shall consider all the factors set forth in Section 8, shall not be required to give substantial weight to any particular factor and shall not take into consideration any certificate of public convenience and necessity.

Nothing in this Section requires any electric supplier to obtain any authorization, either from an incorporated municipality or from the Commission, to extend its lines if, and to the extent that, such supplier, on the effective date of this Act, has such authorization from such municipality or from the Commission under the Public Utilities Act, as the case may be, or as a matter of law, but any such authorization must be lawfully in effect at that time.

Nothing in this Act shall be construed to impair, abridge, or diminish in any way the powers, rights and privileges of incorporated municipalities.

§ 415. Rights and obligations of public utilities as between themselves

The rights and obligations of public utilities as between themselves shall not be affected by this Act except as provided by the Public Utilities Act.

§ 416. Penalty

Any electric supplier which violates any provision of this Act shall, upon conviction thereof, be subject to a fine of not less than $500 nor more than $2,000.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 88-1695

UNITED STATES OF AMERICA, NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION and SOYLAND POWER COOPERATIVE, INC.,

Plaintiffs-Appellees,

v.

SOUTHWESTERN ELECTRIC COOPERATIVE, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois, Alton Division.
No. 86 C 3419—**William D. Stiehl**, *Judge.*

ARGUED NOVEMBER 28, 1988—DECIDED FEBRUARY 8, 1989

Before CUMMINGS and FLAUM, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

CUMMINGS, *Circuit Judge.* This action was filed by the United States (on behalf of the Rural Electrification Administration (REA)), the National Rural Utilities Cooperative Finance Corporation (CFC), and Soyland Power

Cooperative, Inc. (Soyland) against Southwestern Electric Cooperative, Inc. (Southwestern). The plaintiffs sought a declaration that the 1976 contract under which Southwestern promised to purchase all its electric power requirements from Soyland until 2015 is binding and enforceable. Southwestern counterclaimed for a declaration that the contract is void under the doctrines of mutual mistake of fact and frustration of purpose.

The plaintiffs filed a motion for summary judgment and Southwestern filed a cross-motion for partial summary judgment. On December 28, 1987, the district court released a memorandum opinion holding that plaintiffs' motion for summary judgment should be granted and that Southwestern's counterclaim should be dismissed and its cross-motion for partial summary judgment should be denied. 676 F. Supp. 897.

The REA is a government agency which makes or guarantees loans to implement the rural electrification program encompassed by the Rural Electrification Act (7 U.S.C. §§ 901-950(b)). Plaintiff CFC, a not-for-profit District of Columbia association of mostly rural electric cooperatives created to supplement the REA loan programs, has similar interests to REA's. Soyland and Southwestern are members of CFC.

Since the passage of the Rural Electrification Act in 1936, the REA has financed approximately 800 distribution cooperatives across the nation. The members of those cooperatives are rural consumers to whom the cooperatives distribute electric power. Southwestern, located in Greenville, Illinois, has been serving as such a cooperative since 1939.

Soyland, whose principal office is in Decatur, Illinois, is one of 60 generation and transmission cooperatives also financed by the REA loan program. Generation and transmission cooperatives sell their power wholesale to their member distribution cooperatives, such as Southwestern. Although organized in 1963, Soyland was inactive until 1975.

In 1975 Southwestern and fourteen other distribution cooperatives decided to acquire an 8.42% interest[1] in the Clinton Power Station,[2] a nuclear generating plant to be built in DeWitt County, Illinois, by the Illinois Power Company of Sangamon County, Illinois. Soyland was chosen as both the entity through which they would acquire that interest and the generation and transmission cooperative for the fifteen distribution cooperatives' share of the power to be generated by the Clinton plant.

The construction of the plant was marred by a series of delays and cost increases. Although commercial production of power from the Clinton plant was scheduled to commence in June 1980, production of power did not commence until November 1987 (Soyland Br. 8-9). Construction cost estimates of the plant rose from an initial projection of $361,195,000 in February 1976 to $666,654,000 in August 1976 and then to $3,250,000,000 in November 1985. The final cost of the power plant upon completion exceeded $5,000,000,000.

Southwestern and the other fourteen distribution cooperatives acquiring an ownership interest in the Clinton plant financed their acquisition through loans to Soyland made or guaranteed by REA and CFC. By March 1986, REA had advanced $23,815,000 to Southwestern for construction of its electrical distribution system and CFC had loaned it an additional $5,838,000 for the same purpose. Substantial amounts of these loans remain outstanding (663 F. Supp. at 539). REA has also guaranteed the repayment of $480,000,000 in construction loans made to Soyland of which $474,000,000 is still outstanding. Similarly

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[1] This is the percentage interest stated in Southwestern's brief (at p. 9) and may not represent the current interest. In Soyland's state litigation with Illinois Power, the 1977 interest is stated as 10.5% (Southwestern App. J at 3).

[2] In August 1976, Soyland and Western Illinois Power Cooperative, Inc., contracted with Illinois Power Company to have it build the plant.

CFC has advanced $63,000,000 to Soyland, and $58,707,606 remains outstanding (Soyland Br. 5).

As a condition of making these loans to Soyland, REA and CFC required Southwestern and its fourteen sister distribution cooperatives to execute long-term all-requirements wholesale power contracts with Soyland. Under these contracts, the fifteen cooperatives promised to purchase all their power from Soyland at a rate based on the maintenance and generation of power costs, as well as retirement of the debt incurred in construction of the plant as specified in paragraph 4(b) of the contract (676 F. Supp. at 901-902). As a result of keying the pricing formula to the cost of the plant construction, the cost of electricity supplied by the plant to distribution cooperatives such as Southwestern greatly exceeded the projected rates.

All-requirements contracts, such as the Soyland-Southwestern one, secure approximately $40 billion in loans committed by REA to cooperatives throughout the country. As Judge Stiehl found in his first memorandum opinion in this case, this particular long-term all-requirements contract, which REA and CFC required Southwestern and Soyland to negotiate, remains the primary security to ensure the repayment of the extremely large loans which REA and CFC made to Soyland and Southwestern. 663 F. Supp. at 540. He concluded that requiring Southwestern and Soyland to enter into this contract to secure their loans was within the power of the REA administrator under 7 U.S.C. § 904. 663 F. Supp. at 541.

The particular all-requirements contract involved in this lawsuit was executed by Southwestern and Soyland on May 26, 1976. According to Southwestern, Soyland started selling power to Southwestern under this contract in 1983. (Southwestern Br. 15.) On March 24, 1986, Southwestern executed a "deferral agreement" with Soyland, postponing until December 31, 1986, Southwestern's obligation to make further payments commencing with the March 1986 billing. Soyland's complaint admits that Southwestern paid

Soyland for power under the contract from March 1984 through October 1985, but alleges that Southwestern remains in arrears in its payments under the requirements contract; Southwestern denies this arrearage in its pleadings.

In February 1986 Southwestern filed a suit in the Circuit Court of Madison County, Illinois, seeking a judgment that the requirements contract between it and Soyland is void. In that action Southwestern raised similar affirmative defenses and a counterclaim seeking relief similar to the present lawsuit. The state action was later voluntarily dismissed by Southwestern after this action was filed in federal court. Southwestern is the only one of Soyland's fifteen members seeking rescission of its requirements contract with Soyland.

Judge Stiehl handed down two memorandum opinions in this case. The first opinion held that the United States (on behalf of the REA) and CFC had standing to join Soyland in bringing this declaratory judgment action against Southwestern. 663 F. Supp. 538. That holding is not questioned on appeal. The second opinion, which is the basis of this appeal, held that the contract between Soyland and Southwestern is valid and enforceable and therefore rejected Southwestern's arguments that the contract was void on the basis of mutual mistake of fact or frustration of purpose. 676 F. Supp. 897. We affirm.

Introduction to Decision

In *Fuchs v. Rural Electric Convenience Cooperative, Inc.*, 858 F.2d 1210 (7th Cir. 1988), we recently held that a contract between Rural Electric Convenience Cooperative and Central Illinois Public Service Company dividing service areas pursuant to the Illinois Electric Supplier Act was not invalid under the federal antitrust laws. That panel opinion contains a footnote (pp. 1212-1213) which reveals the implications of Southwestern's attempt to void the contract at issue. It provides as follows:

> 8 This dispute is apparently but one variation of the periodic conflicts occurring between co-op customers

and their electricity suppliers. When Congress enacted the REA in 1936, ninety percent of rural residents were without electric power. The REA (along with the National Rural Utilities Cooperative Finance Corporation, which provides additional financing to supplement the REA's loan and loan guarantee program) provided the loan capital for the construction of facilities, the extension of lines, and the generation and transmission of power in sparsely populated areas "which the investor-owned utilities had not found it profitable to service." *Salt River*, 391 F.2d at 473. Total cumulative government financing of rural electrification approaches $50 billion. The co-ops pay for these loans through their member/consumers' electric rates. Now that the rural electric systems are almost universally in place, but not paid for, some co-op customers are disgruntled with their rates, which necessarily reflect the amortization cost of the system.

Consequently, distribution co-ops have tried to sell their assets to neighboring investor-owned utilities, *Tri-State Generation and Transmission Assoc., Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986), or to void their long-term contracts with co-op suppliers whose rates are higher than neighboring utilities. *United States v. Southwestern Electric Coop.*, 663 F. Supp. 538 (S.D.Ill. 1987). The withdrawal of any distribution co-op from the system necessarily shifts the fixed costs of the electricity (represented by the debt service) to the other members of its generation and transmission cooperative and raises the possibility of default, with potentially disastrous results for the system. *See Tri-State*, 805 F.2d at 357. It is clear that somebody will have to retire the debt of the rural electrification system; if co-op customers like plaintiffs succeed in removing themselves from the REA structure in large enough numbers to precipitate default, the costs may eventually be shifted to federal taxpayers.

Mutual Mistake

Southwestern's principal argument for avoiding the May 1976 requirements contract with Soyland is based on the doctrine of mutual mistake.[3] The elements of the doctrine of mutual mistake were set forth recently in *John Burns Construction Co. v. Interlake, Inc.*, 105 Ill. App. 3d 19, 433 N.E.2d 1126 (1st Dist. 1982). In *John Burns*, the trial court rescinded the contract there because of mutual mistake (105 Ill. App. 3d at 24) and the Appellate Court of Illinois affirmed because it said the requisite four elements for mutual mistake were satisfied. Those elements were stated as: (1) the alleged mistake must relate to a material feature of the contract, (2) unconscionability, (3) exercise of reasonable care by the party seeking rescission and (4) the party opposing rescission can be placed in *status quo*.[4] 105 Ill. App. 3d at 25. After reciting these requirements of Illinois law, the district judge added that *Casanas v. Nelson*, 140 Ill. App. 3d 341, 346, 489 N.E.2d 358 (2d Dist. 1986), holds that rescission on the basis of mutual mistake will also not be permitted in Illinois unless "clear and positive evidence" exists demonstrating mutual mistake. 676 F. Supp. at 905.

The fatal difficulty with Southwestern's argument is that while the parties to that contract may have been mistaken about the future costs of construction of the Clinton power plant, the doctrine of mutual mistake does not cover an erroneous "prediction or judgment as to events to occur

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[3] Both parties have conceded that Illinois law controls construction of the contracts in question since they were made in Illinois and do not provide otherwise.

[4] Southwestern argues that these are really the standards for a unilateral mistake. We need not decide the point, but do note that the authorities cited in *John Burns* are unilateral mistake cases. *Santucci Construction Co. v. County of Cook*, 21 Ill. App. 3d 527, 531, 315 N.E.2d 565 (1974); *People ex rel. Dept. of Public Works v. South East National Bank of Chicago*, 131 Ill. App. 2d 238, 241, 266 N.E.2d 778 (1971).

in the future." Restatement (Second) of Contracts § 151*a*. Applying Illinois law, this Court has held in rejecting an asserted mutual mistake claim, "it must be a mistake of a present or a past fact." *Price v. Trunkline Gas Company*, 323 F.2d 394, 396 (1963) (applying Illinois law); see also *S.T.S. Transport Service v. Volvo White Truck Corp.*, 766 F.2d 1089, 1093 (7th Cir. 1985) (also applying Illinois law); *Purvines v. Harrison*, 151 Ill. 219, 224, 37 N.E. 705 (1894); *Casanas v. Nelson*, 140 Ill. App. 3d 341, 347, 489 N.E.2d 358 (2d Dist. 1986); *Boyd v. Aetna Life Insurance Co.*, 310 Ill. App. 547, 555, 35 N.E.2d 99 (4th Dist. 1941). The cost of constructing the power plant when the parties entered into the all-requirements contract at issue was estimated to be $666,654,000, nearly double Illinois Power Company's first published cost estimate in February 1973 of $361,195,000. The 1976 figure of $666,654,000 was clearly nothing more than a projection or estimate of the final cost.

Additionally, after signing the requirements contract, Southwestern and the other members of Soyland authorized it to enter into the August 1976 agreement with Illinois Power Company for the construction of the Clinton plant.[5] Paragraph 8.9 of that construction agreement recognized that the estimated cost of that plant was uncertain and subject to change, for it provided:

> *Cost changes.* The Participants are aware that the estimated costs of the Clinton Station (including cost of fuel) are subject to change by reason, among other matters, of inflation, compliance with additional governmental requirements, design and equipment changes, and delays in construction and commencement of operation. (IV D. Ct. App. 1033.)

[5] See p. 2 of Soyland's May 28, 1976, Board minutes (reproduced between pages 776 and 777 of volume IV D. Ct. App.). Western Illinois Power Cooperative, Inc., joined in the contract. See note 2 *supra*.

Therefore, Southwestern's claim that it should not bear the risk of cost changes cannot be sustained. Indeed the rate provision in paragraph 4(b) of the all-requirements contract between Southwestern and Soyland was keyed to Soyland's generating plant costs (676 F. Supp. at 901-902), undermining Southwestern's present position that it is entitled to rescission. Southwestern has not attempted to satisfy requirement (2) or (4). Therefore we need not consider requirement (3) or whether the district judge correctly concluded that requirement (1) had also not been satisfied.

Southwestern argues that the standard set forth in the Restatement (Second) of Contracts § 152, should govern rather than the *John Burns* test which, according to Southwestern, should only apply to unilateral mistake cases. That argument is futile because, as shown *supra*, the rules governing rescission for either mutual or singular mistake are inapplicable where, as here, a party's erroneous prediction or judgment as to future events is involved. *Idem* § 151*a*.

In the district court, Southwestern attempted to introduce as evidence of a mutual mistake admissions contained in pleadings filed in an unrelated case commenced by Soyland against the plant construction company in state court.[6] In that case, Soyland alleges that Illinois Power Company's project manager's deficient performance was the cause of the tenfold increase in projected construction costs and that Illinois Power Company misrepresented the cost estimates. Southwestern claims that Soyland should be estopped from denying that a mutual mistake exists between Southwestern and Soyland since Soyland alleges in the state court action that it relied upon these allegedly misrepresented figures in entering into the construction agreement. The district court appropriately rejected Southwestern's argument, since Soyland's suit in state court only

[6] *Soyland Power and Western Illinois Power v. Illinois Power*, 86-L-373, was filed in state court in Sangamon County, Illinois.

demonstrates that the estimate of the construction cost of the plant was mistakenly projected by all parties concerned. This does not change the fact that the mistake in this case involved an error in judgment rather than any error in fact.[7]

Frustration of Purpose

Southwestern also asserted in the district court that the contract is voidable under the doctrine of frustration of purpose. In this Court, the argument is pressed much less vigorously, probably because Judge Stiehl recognized that under Illinois law the defense is not to be applied liberally and the party seeking rescission must show that (1) the frustrating event was not reasonably foreseeable and (2) the value of counterperformance has been totally or nearly totally destroyed by the frustrating event, following *Northern Illinois Gas Co. v. Energy Co-Op, Inc.*, 122 Ill. App. 3d 940, 952, 461 N.E.2d 1049 (3d Dist. 1984). Southwestern has been unable to cite any contrary Illinois or federal case. Indeed, in *Northern Indiana Public Service v. Carbon County Coal*, 799 F.2d 265, 278 (1986), this Court rejected the defense of frustration of purpose where, as here, the contract in question allows for escalation of price. As we stated there, "[i]f, as is also the case here, the buyer forecasts the market incorrectly and therefore finds himself locked into a disadvantageous contract, he has only himself to blame and so cannot shift the risk back

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[7] *Aluminum Company of America v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980) ("Alcoa"), on which Southwestern principally relies, is inapposite because it was purportedly controlled by Indiana law (at pp. 59-60). Moreover, the case has "faded into obscurity." Halpern, Application of the Doctrine of Commercial Impracticability: Searching for the "Wisdom of Solomon," 135 U. Pa. L. Rev. 1123, 1127 (1987). Finally, *Alcoa* does not apply where, as here, both parties entered into the requirements contract with conscious ignorance of the eventual higher construction cost of the Clinton plant and where that factor did not enrich Soyland. *Matter of Westinghouse Elec. Corp., etc.*, 517 F. Supp. 440, 459 (E.D. Pa. 1985).

to the seller by invoking impossibility or related doctrines" such as frustration of purpose. *Northern Indiana*, 799 F.2d at 278.

Similarly, in *Neal Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974), the Canadian government caused a rise in potash prices which defendant supplier claimed to excuse its nonperformance. However, we held that the fact that the performance became economically burdensome was not sufficient to excuse performance. Other more recent cases denying the frustration of purpose defense in circumstances similar to those here include *United States v. Great Plains Gasification Associates*, 819 F.2d 831 (8th Cir. 1987), certiorari denied, 108 S. Ct. 285, and *Langham Hills Petroleum, Inc. v. Southern Fuels Co.*, 813 F.2d 1327 (4th Cir. 1987).

The only argument Southwestern presents in opposition to these authorities is that this defense should have been considered by a jury rather than denied by the district judge. However, in all the foregoing cases, the defense was rejected by the trial judge and not presented to a jury. Perhaps this is why Southwestern's reply brief does not even touch upon the frustration of purpose defense.[8]

The decision of the district court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[8] In view of our decision that Southwestern was not excused from performance on the ground of mutual mistake or frustration of purpose, there is no need to consider Southwestern's additional arguments that rescission would be inequitable or barred by estoppel.

No. 88-1358

FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1988

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DEGROOT, KENNETH E. HAUBOLD, RICHARD HAUBOLD, PAUL A. HENDRICKS, and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, and MARY E. BUSHNELL, CHAIRMAN of the ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT CENTRAL ILLINOIS PUBLIC SERVICE COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the State of Illinois has actively supervised its clearly articulated policy in favor of the avoidance of duplicative electric utility facilities through the authorization of territorial agreements, such as the one between Central Illinois Public Service Company and Rural Electric Convenience Cooperative, by supervising the entry of those agreements and by retaining jurisdiction to resolve any disputes that may arise under those agreements.

2. Whether a not-for-profit electric cooperative may establish state action immunity from the federal antitrust laws without a showing of active supervision under the rationale of this Court's decision in *Town of Hallie v. City of Eau Claire.*

STATEMENT PURSUANT TO RULE 21.1(b)

The caption of this case in this Court lists all parties to the proceeding in the Court of Appeals below.

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BRIEF OF RESPONDENT CENTRAL ILLINOIS PUBLIC SERVICE COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 858 F.2d 1210 and is reproduced in the Appendix to the Petition at p. A-1. The opinion order of the District Court is reported at 672 F.Supp. 1111 and is reproduced in the Appendix to the Petition at p. B-1. The supplemental orders of the District Court are unreported and are reproduced in the Appendix to the Petition at pp. C-1, D-1 and E-1.

JURISDICTION

Petitioners have applied for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The Court's jurisdiction was invoked pursuant to 28 U.S.C. § 1254(1) after the petitioners' petition for rehearing and rehearing *in banc* was denied on November 17, 1988.

STATUTES INVOLVED

Illinois Public Utilities Act, Ill. Ann. Stat. ch. 111 2/3, § 1-101 *et seq.* (Smith-Hurd 1985):

> § 3-104. . . . "Public utility" does not include . . . electric cooperatives as defined in Section 3-119 . . .
>
> § 3-119. "Electric cooperative" is any cooperative which is subject to the Electric Suppliers Act. . . .
>
> § 4-101. The [Illinois Commerce] Commission shall have general supervision over all public utilities . . . It shall keep informed as to their . . . rates and other charges . . .
>
> § 9-201(a). . . . no change shall be made by a public utility in any rate or other charge or classification . . . except after 45 days' notice to the Commission . . .

Illinois Electric Supplier Act, Ill. Ann. Stat. ch. 111 2/3, § 401 *et seq.* (Smith-Hurd 1985):

> § 402. The General Assembly declares it to be in the public interest that, in order to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in inconvenience and diminished efficiency in electric service to the public, any 2 or more electric suppliers may contract, subject to the approval of the Illinois Commerce Commission, as to the respective areas in which each supplier is to provide service.
>
> § 403.5. "Electric Supplier" or "Supplier" means an electric cooperative or a public utility which furnishes electric service.
>
> § 403.17. "Service area" means that area, defined in an agreement between electric suppliers, which has been

approved by the Commission, in which an electric supplier is entitled to furnish service, as provided in Section 6.

§ 405. . . . Except as otherwise provided in this Act or (in the case of public utilities) the Public Utilities Act, no electric supplier may construct new lines, or extend existing lines, to furnish electric service to a customer or his premises which another electric supplier is entitled to serve, as provided in this Section, except with the written consent of such other electric supplier subject to the approval of the Commission as to such consent, if required.

§ 406. Any 2 or more electric suppliers may contract together defining and delineating, as between themselves, one or more service areas in which each such contracting supplier shall be entitled to furnish service. Such contracts are subject to the approval of the Commission.

§ 407. Except as otherwise provided in this Act, . . . no electric supplier may make an extension of existing lines or construct new lines for the purpose of furnishing service to a customer or premises which it is not entitled to serve under Section 5, or furnish service to any customer or premises which such supplier is not entitled to serve under Section 5, unless in any such case such electric supplier gives written notice to the electric supplier or suppliers which may be adversely affected by the proposed construction, extension or service. . . .

§ 408. When a complaint has been filed as provided in Section 7, the Commission shall proceed, after reasonable notice to the suppliers concerned, to a hearing to determine which of the suppliers is entitled or should be permitted under this Act to furnish the proposed service. . . . The Commission shall then make its determination as to which supplier is entitled or should be permitted under this Act to furnish the proposed service. In making this determination, the Commission shall act in the public interest and shall give substantial weight to the consideration as to which supplier had existing lines in proximity to the premises proposed to be served, provided such lines are adequate. In addition, the Commission may consider, but with lesser weight, (a) the customer's preference as to

which supplier should furnish the proposed service, (b) which supplier was first furnishing service in the area, (c) the extent to which each supplier assisted in creating the demand for the proposed service, and (d) which supplier can furnish the proposed service with the smaller amount of additional investment. . . .

§ 409. (a) Any customer receiving service from any electric supplier, which is not subject to the Public Utilities Act, who contends that he is not receiving adequate service from that supplier, or who contends that he is being discriminated against by that supplier, may complain to the Commission. . . .

§ 410. The Commission shall make and adopt such reasonable rules and regulations as are necessary to enforce compliance with and to administer the provisions of this Act.

§ 411. The Commission shall have the power and jurisdiction to, and shall, enforce compliance with this Act . . .

Sherman Act § 1, 15 U.S.C. § 1:

Every contract, combination or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

STATEMENT OF THE CASE

Over twenty years ago, the Illinois Legislature enacted the Electric Supplier Act, Ill. Ann. Stat. ch. 111 2/3, § 401 *et seq.* (hereinafter the "ESA") (Smith-Hurd 1985). The express purpose of the ESA was to avoid the duplication of facilities that would result from electric suppliers competing for the right to serve the same customer as well as the inconvenience and inefficiency that such multiple service would cause. ESA § 402. To address this purpose, the ESA limited electric suppliers such as respondents Central Illinois Public Service Company ("CIPS") and Rural Electric Convenience Cooperative, Inc. ("RECC") to serving their existing customers from their existing distribution lines. ESA § 405. In order to serve any new customer, the ESA required electric suppliers to enter agreements among themselves, subject to the approval of the Illinois Commerce Commission (the "ICC"), delineating their service boundaries and governing which electric supplier would extend service to which new customers. In the absence of an agreement, the ESA provided that service to new customers would be allocated by the ICC on a case-by-case basis. ESA §§ 406-408; Appellate Opinion, 858 F.2d at 1212.

In compliance with the requirements of the ESA, on February 19, 1968, CIPS and RECC entered into a contract establishing their respective service territories (the "Agreement") and submitted the Agreement to the ICC for approval on February 27, 1969. On April 29, 1969, the ICC issued its approval, finding that the Agreement was both in the public interest and in conformance with the requirements of the ESA. 858 F.2d at 1212. The Agreement contains no mention of the rates either party will charge its respective customers; CIPS' rates are strictly regulated by the ICC, and RECC's rates are confined by its own by-laws and its federal mandate to the sum of its costs of operation. Illinois Public Utilities Act, Ill. Ann. Stat. ch. 111 2/3, § 4-101 and § 9-201 (hereinafter the "PUA") (Smith-Hurd 1985); 858 F.2d at 1217. Indeed, petitioners

have never asserted that CIPS entered any agreement with RECC to fix prices. The sole basis of the claims asserted against CIPS resides in the service area agreement authorized by the ESA and approved by the ICC.

The petitioners, who reside within the RECC service territory, are owner-members of the RECC. Until very recently, they enjoyed utility rates lower than their "neighbors" in CIPS' territory. Circumstances changed, however, as the RECC's non-profit rates began to reflect the mounting debt associated with RECC's participation in the Clinton nuclear power facility and the capital costs of building its electric distribution facilities. 858 F.2d at 1211 n.2; 858 F.2d at 1212-1213 n.8. At the time of suit, the petitioners sought to escape the relatively higher RECC rates by challenging the agreement allocating service territories between RECC and CIPS. They alleged in their Complaint that but for the Agreement, they could obtain electricity from CIPS. Their allegations assume that CIPS would find it economical to extend its facilities to serve them and further assume that the ICC would issue a certificate of convenience to permit CIPS to render such service. 858 F.2d at 1212 n.7.

The District Court granted the respondents' motions to dismiss and for summary judgment on the basis of the state action doctrine first articluated by this Court in *Parker v. Brown,* 317 U.S. 341 (1943). The merits of petitioners' underlying claim were not placed in issue by those motions or the District Court's decision. CIPS has consistently maintained that even in the absence of state action immunity petitioners have no cause of action under the antitrust laws.

The Court of Appeals for the Seventh Circuit unanimously affirmed the decision of the District Court. The Court of Appeals held that the rationale of this Court's decision in *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985), stating that the active supervision requirement serves only an evidentiary

function to insure against purely private price fixing, applies equally to municipalities and other public entities, such as RECC, which lack the motivation to enter private price fixing agreements. Most importantly as it relates to CIPS, the Court of Appeals found that, "[a]s to CIPS, therefore, the challenged restraint is clearly articulated and the 'policy' actively supervised within the meaning of *Midcal.*" 858 F.2d at 1218.

Hence, contrary to petitioners' assertion, the Court of Appeals did not implicitly recognize that the active supervision element of the state action doctrine required price supervision of the RECC's rates. At least as it relates to CIPS, the Court of Appeals found that all of the traditional state action principles had been satisfied.

REASONS FOR DENYING THE WRIT

I. There is No Basis for a Writ to Review Petitioners' Claims Against Central Illinois Public Service Company

As confirmed by a review of the Petition for Certiorari, petitioners do not contest the holdings of the courts below that the challenged conduct of CIPS was pursuant to a clearly articulated state policy which was, as to CIPS, actively supervised. Rather, petitioners continue to press before this Court the argument that RECC cannot be afforded state action immunity without the State of Illinois also imposing regulation of RECC's rates to its owner-members. CIPS disagrees, as did both courts below, with petitioners' argument. Regardless of the final resolution of that question, however, this Court need not review the holding that CIPS has met all of the state action requirements. Indeed, there is no dispute that every aspect of CIPS' conduct with respect to the Agreement has been actively supervised by the State of Illinois as required by this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

CIPS maintains, moreover, that whether the State of Illinois actively supervises the rates RECC charges its members is irrelevant to the state action inquiry here because the allegedly anticompetitive act in suit, the Agreement between CIPS and RECC, did not concern RECC's rates. In other words, the test of active supervision must necessarily be a function of the anticompetitive act to be supervised. This Court said no less when, following *Midcal,* it held, "the *anticompetitive conduct* 'must be "actively supervised" by the state itself.' " *Patrick v. Burget,* _____ U.S. _____, 108 S. Ct. 1658, 1663 (1988) (emphasis supplied); *see also 324 Liquor Corp. v. Duffy*, to be reported at 479 U.S. 335, 107 S.Ct. 720, 725 n.6 (1987) (suggesting that a straight minimum mark-up statute, as self enforcing, would satisfy the active supervision requirement).[1]

Stated simply, it is no failure of the state action doctrine for the state to fail to supervise that over which it has no express policy. The purpose of state action immunity is to recognize the principle of state sovereignty in our federal system. It would be anomalous indeed for a federal court to reject a state action immunity defense because the state implemented and supervised one policy, territorial agreements, but chose not to implement and supervise a second policy, regulation of electric cooperative rates. Here, the result would be even more anomalous because the State of Illinois consciously made the decision not to regulate the rates of electric cooperatives.[2]

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[1] Professors Areeda and Hovenkamp have suggested that even though such a statute would result in the elimination of price competition, that result would satisfy *Midcal* because it represented the choice of the state and not private actors. Areeda and Hovenkamp, *Antitrust Law,* § 212.7 at p. 146 (1987 Supp.).

[2] On the same day that the ESA was adopted, the Illinois Legislature amended the Illinois Public Utilities Act to exclude electric cooperatives from the definition of a public utility under that act and, thereby, from ICC rate regulation. PUA § 3-104.

A territorial agreement, such as the one in suit, is essentially self-enforcing. Consequently, the sole state action concern is whether the state actively supervised the implementation of, and the conduct of the parties pursuant to, that Agreement. The ESA provides the required supervision. As the Court below explained, "Under the ESA, the ICC approves the agreement, resolves all disputes under it, and has the power to enforce compliance with its rulings. ESA §§ 407-416." 858 F.2d at 1218.

In the context of peer review cases, this Court has recently held that state review of the peer committee's decision alone meets the active supervision standard. *Patrick,* 108 S.Ct. at 1663-65. Territorial divisions are essentially the same as peer review determinations in that they constitute single decisions, single acts, for which there can be only one primary act of review, at the time the agreement is proposed and the territorial borders established. Here, however, the State of Illinois went further and provided for continuing oversight to resolve any potential disputes concerning the boundaries created by the Agreement.

The active supervision element of the state action doctrine requires no more. There is no cause to reconsider the panel's decision affirming the dismissal of petitioners' Complaint against CIPS.

II. The Court of Appeals' Rationale Is Neither Novel Nor in Conflict With the Decisions of This Court.

In *Town of Hallie,* this Court acknowledged that the active supervision prong of the *Midcal* test did not comport with the realities of local government and the supply of services, such as sewage collection and treatment, to local populations. In *Town of Hallie,* this Court did not simply state that municipalities were henceforth absolved from the active supervision requirement of *Midcal.* Rather, this Court held that the active supervision requirement:

> serves essentially an *evidentiary function:* it is *one way* of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. . . . Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. . . . Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Town of Hallie, 471 U.S. at 46-47 (emphasis supplied).

The rationale of this decision was not limited to traditional municipalities. Instead, the Court's decision acknowledged that there may be alternate, yet equally persuasive, evidence of conformity with a state's articulated policy sufficient to render the active supervision inquiry unnecessary. The Court did not foreclose the application of the *Town of Hallie* rationale in appropriate cases, such as this one.

In fact, it is far from novel to see the rationale of *Town of Hallie* applied outside the traditional municipality context. The Court of Appeals' opinion relied on the thoughtful analysis of three other circuits in which the *Town of Hallie* decision was held to justify state action immunity for "hybrid" entities: *Interface Group, Inc. v. Massachusetts Port Auth.,* 816 F.2d 9, 13 (1st Cir. 1987) (the airport authority resembled or "was equivalent to" a municipality); *Ambulance Serv. of Reno v. Nevada Ambulance Serv.,* 819 F.2d 910, 913 (9th Cir. 1987) (the ambulance service was "much closer to" a municipality); and *Commuter Transp. Sys. v. Hillsborough County Aviation Auth.,* 801 F.2d 1286, 1290 (11th Cir. 1986) (the aviation authority was "analogous to a municipality").

The Court of Appeals found that RECC, like the entities in those cases, falls somewhere between a municipality and a

purely private entity, and concluded that RECC, too, should be considered under the *Town of Hallie* standard. Contrary to petitioners' purportedly scientific analysis of those cases, not one was decided explicitly on principles of municipal corporation law; they were each decided on a common sense analysis by the individual courts, using principles of analogy and relationship common to all areas of judicial endeavor. *E.g., Lancaster Community Hosp. v. Antelope Valley Hosp. Medical Center,* 1988-1 Trade Cas. (CCH) ¶ 67,933 at 57,733 (C.D. Ca. 1988) ("Courts constantly analogize to cases similar, but not identical, to the case before them. The authority cited above [including *Interface*] is substantially similar to the present case and the Court finds it persuasive [that a hospital district qualif[ies] as a municipality eligible for immunity.]").

The realities of electric cooperative operation, moreover, indicate the presence of the same kinds of factors that fueled the decision in *Town of Hallie* and the subsequent decisions on which the panel relied. For example, RECC, like a municipality, has the power of eminent domain, is controlled by its members, each of whom have a vote to cast in electing its management board, and has the public motivation of advancing its members' welfare instead of being motivated by a profit incentive. In fact, the RECC is strictly non-profit; any excess charges it collects are returned to its members. Thus, the panel below correctly determined that as to RECC, there was no need to search for the active supervision of the State of Illinois' policy not to regulate RECC's rates to its members as part of its supervision of RECC's agreement with CIPS.

Neither does the decision below "virtually nullify the active supervision requirement" as the petitioners maintain. Petition For a Writ of Certiorari at 5. The active supervision requirement, as described by the prior decisions of this Court, serves as an evidentiary standard, the application of which depends on the facts before the court. If a court is satisfied that

the facts do not suggest the motivation for private price fixing, as in the case of municipalities, and other non-private, non-profit entities such as RECC, there is no need to require active supervision to prevent an activity that the court has already determined will not occur. Here, there is no private party that can benefit from unfettered private price fixing; CIPS' rates are regulated and RECC's rates are capped by its non-profit pricing formula. No amount of added supervision of RECC's non-profit rates will make any difference from an antitrust perspective.

Petitioners' inability to comprehend the *Town of Hallie* evidentiary standard becomes most obvious when they suggest that a public utility, such as CIPS, could satisfy the *Town of Hallie* rationale as applied below. Petition for a Writ of Certiorari at 7-8. The panel's decision did not go so far. Indeed, since a public utility, owned by private investors, seeks pecuniary gain, it would not satisfy the standard articulated by the Court below. The Court below required more than the provision of a public service to meet the *Town of Hallie* rationale. Only public entities, in terms of their focus on delivering public benefit to their constituents or members, i.e., non-profit motivations, pursuing a clearly articulated state policy, may come within the *Town of Hallie* rationale.

Finally, the lower courts' decisions did not create a blanket exemption from the antitrust laws for non-profit or cooperative organizations as if such organizations were the state itself. *Hoover v. Ronwin,* 466 U.S. 558, 569 (1984). The petitioners' argument that the lower courts' opinions overturned well-settled precedent for holding cooperatives and non-profit organizations subject to liability under the federal antitrust laws overlooks the one fact, aptly explained by the Court of Appeals, that distinguishes this case from the honor-roll of decisions to which petitioners refer:

> There is no question that RECC and CIPS entered into, and the ICC approved, the service area agree-

> ment pursuant to "a clearly articulated and affirmatively expressed policy to displace competition." As the district court stated, one could hardly envision a statutory scheme that evinces a clearer, more affirmative intent.

858 F.2d at 1216; *see also* 858 F.2d at 1214 n.10. The decisions below did no more than recognize the principles of federalism that this Court announced over forty years ago in *Parker v. Brown;* they did not rewrite the state action exemption to the antitrust laws.

CONCLUSION

For the reasons stated, a writ of certiorari should not issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit. In particular, there is no justification, and no request, to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Seventh Circuit with respect to defendant CIPS. The application should be denied.

Respectfully submitted,

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No. 88-1358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DeGROOT, KENNETH E. HAUBOLD, RICHARD HAUBOLD, PAUL A. HENDRICKS, and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, and MARY E. BUSHNELL, CHAIRMAN of the ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEFS IN OPPOSITION

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Respondents make only feeble defense of the "non-private" rationale adopted by the court of appeals for dispensing with the active-supervision requirement, and they offer no explanation as to how the *nonprofit* or *cooperative* attributes of an enterprise provide special grounds for immunity from the federal antitrust laws. As a leading

text has observed, in criticism of the district court decision in this case, "But many antitrust defendants have been nonprofit corporations that acted anticompetitively in behalf of themselves or their members." See Areeda & Hovenkamp, *Antitrust Law* ¶ 212.7 at p. 157 (1988 Supp.).

The only attempt to meet this problem is one that begs the very question at issue. Respondent CIPS argues that the "one fact" that distinguishes this case from "the honor-roll of decisions" [finding nonprofit and cooperative organizations in violation of the antitrust laws] is that the territorial agreement between CIPS and RECC was entered into pursuant to "a clearly articulated and affirmatively expressed policy to displace competition." Brief of CIPS 12-13. But this Court has held, of course, that the existence of such a clearly articulated policy is not enough; the second requirement is "active supervision," and the whole question presented is whether the nonprofit, cooperative nature of an otherwise private actor is enough to displace that second requirement.

The alternative grounds suggested by respondents for upholding the decision below are also without merit.

1. Respondent RECC suggests that its rates are in fact regulated or supervised ("closely controlled") by the federal Rural Electrification Administration ("REA"). Brief of RECC 8-9. But the materials cited by RECC show that REA's control over RECC's rates is directed to requiring that the rates cover RECC's indebtedness to REA, not to protecting consumers against excessive rates. This Court's decision in *Arkansas Electric Cooperative v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 385-89, 103 S.Ct. 1905, 1913-15 (1983) makes clear that REA is not and was never intended to be a substitute for state rate regulation.

2. Respondent CIPS argues that the active supervision requirement is *satisfied* because the Illinois statute implements and supervises the "policy" of permitting exclusive territory agreements, and that no supervision of rates is required because the state has "no policy" of regulating rates. Brief of CIPS 8-9. The argument, if accepted, would render the active-supervision requirement meaningless. The need for supervision arises because the state's policy of permitting exclusive territories confers on private entities the discretion to engage in anticompetitive conduct that would otherwise be forbidden by the antitrust laws—i.e., to set prices unrestrained by market forces. The supervision requirement is imposed in order to prevent abuse of that discretion, i.e., to control the resulting conduct.

It is strange that CIPS cites the recent decision in *Patrick v. Burget* in support of its argument. As CIPS notes with emphasis, *Patrick v. Burget* reaffirmed *Midcal's* holding that "the *anticompetitive conduct* 'must be "actively supervised" by the state itself.' " Brief of CIPS 8. CIPS might equally well argue that a state may have a policy of authorizing price-fixing agreements (and "supervising" them by enforcing them and resolving disputes under them) without supervising the prices set, because the state chooses to have "no policy" as to the prices that may be charged. If supervising the *anticompetitive conduct* that flows from a policy of permitting exclusive territories has any meaning, it must mean providing some supervision over the prices charged by the agreeing parties.

3. Respondent CIPS argues that the decision in *Town of Hallie* has reduced the active-supervision requirement to serving a mere "evidentiary function"—meaning, apparently, that if the state's policy of displacing the antitrust laws is articulated clearly and forcefully enough, the active supervision requirement disappears. Brief of CIPS

10-12. Nothing in the *Town of Hallie* opinion suggested that such an "evidentiary function" is the purpose of the active-supervision requirement outside the field of municipalities, which was the only aspect of the state-action doctrine addressed in *Town of Hallie*. The fact that that decision did not imply any dilution of the active-supervision requirement as to private actors is shown by this Court's subsequent decision in *Patrick v. Burget*, which emphatically reaffirmed the two-pronged requirement of the *Midcal* decision where nongovernmental entities or actors are involved.

4. Respondent CIPS appears to suggest that it could not be held liable even if RECC were, because its own rates are regulated. Brief of CIPS 7. The suggestion is plainly wrong. "[I]n the absence of state action immunity, a territorial agreement, even one between regulated utilities, is a per se violation of the Sherman Act." *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 665 F. Supp. 1493, 1532 (S.D. Fla. 1987) (citing authorities).

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be granted and the decision of the court of appeals should be reversed, in conformity with this Court's decisions in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Southern Motor Carriers Rate Conference Inc. v. United States*, 471 U.S. 48 (1985); and *Patrick v. Burget*, 108 S.Ct. 1658 (1988).

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